

MONTANA LEGISLATIVE HISTORY

Chapter 378 1997

Bill H 222 S _____

Original bill & history ☒ c

H. Committee on Judiciary

Hearing Date(s) 2-4 _____ c

2-10 _____ c

2-11 _____ c

_____ c

Date Out 2-11 _____ c

S. Committee on Judiciary

Hearing Date(s) 3-5 _____ c

3-7 _____ c

_____ c

_____ c

DATE Out 3-7

Did this bill originate in an interim committee? _____ Yes _____ No

Committee _____

Report _____

1997 LEGISLATIVE HISTORY

The 1997 Montana Legislature has dramatically changed the nature of the legislative minutes. Specifically, the minutes from House committees are extremely sparse in content, offering no substantive information from which to glean legislative intent. The Senate committees' minutes are somewhat fuller in content. Exhibits available from the State Law Library (which may include written statements, attendant information, roll call votes, roll call attendance, a list of public members present, specific action taken on legislative bills, etc.) are included with this request. For information on other exhibits, contact the Montana Historical Society Archives at 444-4774. Exhibits may also be purchased on a CD-ROM from the Montana Legislative Council (444-3064).

Just as in the 1995 legislative session, the House and Senate hearings were recorded. The Historical Society is the depository for the tapes. For information on accessing the tapes, call the archives at 444-4774.

If you have concerns over the format of the 1997 legislative minutes, it is suggested that you contact your state legislators.

2/21 SIGNED BY GOVERNOR
CHAPTER NUMBER 29
EFFECTIVE DATE: 10/01/97

HB 219 INTRODUCED BY PROUSE, ET AL. LC0735 DRAFTER: COLHOUN
ELIMINATE NITRATE TESTING REQUIREMENTS FOR SINGLE-FAMILY
SEPTIC SYSTEMS

1/10 INTRODUCED
1/10 FIRST READING
1/10 REFERRED TO NATURAL RESOURCES
1/10 FISCAL NOTE REQUESTED
1/16 FISCAL NOTE RECEIVED
1/22 HEARING
2/03 TABLED IN COMMITTEE
2/27 MISSED DEADLINE FOR 45TH DAY TRANSMITTAL
DIED IN COMMITTEE

HB 220 INTRODUCED BY LAWSON LC0912 DRAFTER: STERNBERG
PROVIDE FOR THE ISSUANCE OF A CLASS B-12 OUTFITTER-SPONSORED
NONRESIDENT ARCHERY DEER LICENSE

1/10 INTRODUCED
1/10 FIRST READING
1/10 REFERRED TO FISH, WILDLIFE & PARKS
1/10 FISCAL NOTE REQUESTED
1/15 FISCAL NOTE RECEIVED
1/16 FISCAL NOTE PRINTED
1/28 HEARING
2/11 TABLED IN COMMITTEE
4/05 MISSED DEADLINE FOR 71ST DAY TRANSMITTAL
DIED IN COMMITTEE

HB 221 INTRODUCED BY JORE LC1089 DRAFTER: MCCLURE
ABOLISH PROVISIONS REQUIRING A PARENT TO ENROLL A CHILD IN
SCHOOL AND PROVISIONS REQUIRING A CHILD TO ATTEND SCHOOL

1/10 INTRODUCED
1/10 FIRST READING
1/10 REFERRED TO EDUCATION & CULTURAL RESOURCES
1/10 FISCAL NOTE REQUESTED
1/15 FISCAL NOTE RECEIVED
1/16 FISCAL NOTE PRINTED
1/20 HEARING
1/24 TABLED IN COMMITTEE
2/27 MISSED DEADLINE FOR 45TH DAY TRANSMITTAL
DIED IN COMMITTEE

HB 222 INTRODUCED BY ANDERSON, ET AL. LC0145 DRAFTER: MACMASTER
ADOPT STANDARDS ESTABLISHED FOR DEATH PENALTY CASES BY THE
FEDERAL ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF
1996

1/10 INTRODUCED
1/10 FIRST READING
1/10 FISCAL NOTE REQUESTED
1/10 REFERRED TO JUDICIARY
1/17 FISCAL NOTE RECEIVED
2/04 HEARING
2/12 COMMITTEE REPORT—BILL PASSED AS AMENDED

2/15	2ND READING PASSED	87	11
2/18	3RD READING PASSED	88	12
	TRANSMITTED TO SENATE		
2/19	FIRST READING		
2/19	REFERRED TO JUDICIARY		
3/05	HEARING		
3/12	COMMITTEE REPORT—BILL CONCURRED AS AMENDED		
3/14	2ND READING CONCURRED	44	5
3/15	3RD READING CONCURRED	46	3
	RETURNED TO HOUSE WITH AMENDMENTS		
4/08	2ND READING AMENDMENTS CONCURRED	95	4
4/09	3RD READING CONCURRED AS AMENDED	77	21
4/15	SIGNED BY SPEAKER		
4/15	SIGNED BY PRESIDENT		
4/16	TRANSMITTED TO GOVERNOR		
4/24	SIGNED BY GOVERNOR		
	CHAPTER NUMBER 378		
	EFFECTIVE DATE: 04/24/97, EXCEPT FOR THE PROVISION IN SECTION 6(3)(a) THAT NOTIFICATION MUST STATE THAT COUNSEL TO BE APPOINTED WILL MEET SUPREME COURT STANDARDS FOR COUNSEL IS EFFECTIVE ON THE EFFECTIVE DATE OF STANDARDS ADOPTED UNDER SECTION 7.		

HB 223 INTRODUCED BY SIMPSON, ET AL. LC0565 DRAFTER: MALY

APPROPRIATE FUNDS TO THE DEPARTMENT OF PUBLIC HEALTH AND HUMAN SERVICES FOR USE BY THE OFFICE OF AGING IN THE PROVISION OF INFORMATION SERVICES AND TO SUPPORT THE LONG-TERM CARE OMBUDSMAN

1/10	INTRODUCED		
1/10	FIRST READING		
1/10	REFERRED TO APPROPRIATIONS		
1/23	HEARING		
1/23	FISCAL NOTE REQUESTED		
1/29	FISCAL NOTE RECEIVED		
2/11	FISCAL NOTE PRINTED		
3/11	TABLED IN COMMITTEE		
3/28	MISSED DEADLINE FOR 67TH DAY TRANSMITTAL		
	DIED IN COMMITTEE		

HB 224 INTRODUCED BY KITZENBERG LC0284 DRAFTER: MITCHELL

AMEND FIRE AND SAFETY REQUIREMENTS FOR FUEL TANKS ON FARMS AND RANCHES

1/10	INTRODUCED		
1/10	FIRST READING		
1/10	REFERRED TO AGRICULTURE, LIVESTOCK & IRRIGATION		
1/21	HEARING		
2/04	TABLED IN COMMITTEE		
2/20	COMMITTEE REPORT—BILL PASSED		
2/21	2ND READING PASSED	74	23
2/26	3RD READING PASSED	77	22
	TRANSMITTED TO SENATE		
3/03	FIRST READING		
3/03	REFERRED TO AGRICULTURE, LIVESTOCK & IRRIGATION		
3/10	HEARING		
3/18	COMMITTEE REPORT—BILL CONCURRED		
3/21	2ND READING CONCURRED	49	0
3/22	3RD READING CONCURRED	47	2

HOUSE JUDICIARY

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- BILL NO - REFERRED - HEARING - OTHER CONSIDERATION DATES - EXECUTIVE ACTION/DATE/VOTE - REREFERRED - DATE READ

HB0195	TASH, BILL	1/09	1/20	REQUIRE STATE AGENCY PAY FEE TO FILE CERTAIN WARRANTS, LIENS, AND ABSTRACTS	PASS AS AMENDED	01/27	VOTE: 16-1	TAXATION	1/28
HB0199	KNOX, DICK	1/09	1/27	NOTIFY BILL SPONSOR OF RULE PROPOSAL TO IMPLEMENT BILL	DO PASS	01/27	VOTE: 17-0		1/28
HB0200	AHNER, CHRIS	1/09	1/28	SURREPTITIOUS TAKING OF VISUAL IMAGE IN CERTAIN ROOMS IN PLACE OF BUSINESS	PASS AS AMENDED	01/28	VOTE: 20-0		1/29
HB0208	MARSHALL, ROD	1/09	1/22	INCREASE DUI PENALTIES	PASS AS AMENDED	01/30	VOTE: 18-0		1/31
HB0215	ORR, SCOTT	1/10	1/28	EXPAND DEFINITION OF POLICE DOG TO INCLUDE SEARCH AND RESCUE	PASS AS AMENDED	01/28	VOTE: 18-2		1/29
HB0218	CLARK, ROBERT	1/10	1/20	REVISE REFERENCE TO FED. GUN-FREE SCHOOL ZONE ACT IN INDIVID. LICENSURE LAW	DO PASS	01/20	VOTE: 18-0		1/20
HB0222	ANDERSON, SHIELL	1/10	2/04	DEATH PENALTY SENTENCING AND POSTCONVICTION PROCEEDINGS REVISIONS	PASS AS AMENDED	02/11	VOTE: 11-8		2/12
HB0231	BARNHART, BEVERLY	1/11	1/29	REVISE CHILD CUSTODY & VISITATION; PARENTING PLAN REQUIRED 02/06/97 TABLED 10-7	PASS AS AMENDED	02/18	VOTE: 14-6		2/18
HB0234	BITNEY, ROD	1/11	1/24	PROPOSED CONSTITUTIONAL AMENDMENT TO DEFINE PRINCIPLES FOR CRIMINAL LAWS	PASS AS AMENDED	01/27	VOTE: 16-0		1/31
HB0239	TROPILA, JOE	1/13	1/22	PROHIBIT A NOTARY PUBLIC FROM NOTARIZING THE NOTARY'S OWN SIGNATURE	PASS AS AMENDED	01/30	VOTE: 16-0		1/31
HB0243	DENNY, MATT	1/13	2/06	ALLOW ASSIGNMENT OF CIVIL CLAIMS FOR PENALTIES FOR SHOPLIFTING	PASS AS AMENDED	01/20	VOTE: 20-0		2/11
HB0251	HOLLAND, DON	1/14	2/03	ALLOW JURY COSTS TO BE ASSESSED AGAINST A PARTY IN CERTAIN CIVIL CASES	PASS AS AMENDED	02/05	VOTE: 19-1		2/07

House BILL NO. 222

INTRODUCED BY

Anderson M-Taylor
Mercer Henry HARP

A BILL FOR AN ACT ENTITLED: "AN ACT ADOPTING STANDARDS ESTABLISHED FOR DEATH PENALTY CASES BY THE FEDERAL ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996; IMPOSING A TIME LIMIT FOR THE SENTENCING HEARING IN A DEATH PENALTY CASE; GENERALLY REVISING LAWS PERTAINING TO POSTCONVICTION PROCEEDINGS; AMENDING SECTIONS 46-18-102, 46-18-301, 46-21-101, 46-21-102, 46-21-105, AND 46-21-201, MCA; AND PROVIDING EFFECTIVE DATES AND APPLICABILITY DATES."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 46-18-102, MCA, is amended to read:

"46-18-102. Rendering judgment and pronouncing sentence. (1) The judgment ~~shall~~ must be rendered in open court.

(2) If the verdict or finding is not guilty, judgment ~~shall~~ must be rendered immediately and the defendant ~~shall~~ must be discharged from custody or from the obligation of ~~his~~ the bail bond.

(3) (a) ~~Except as provided in 46-18-301, if~~ the verdict or finding is guilty, sentence ~~shall~~ must be pronounced and judgment rendered within a reasonable time.

(b) When the sentence is pronounced, the judge shall clearly state for the record ~~his~~ the reasons for imposing the sentence."

Section 2. Section 46-18-301, MCA, is amended to read:

"46-18-301. Hearing on imposition of death penalty. (1) When a defendant is found guilty of or pleads guilty to an offense for which the sentence of death may be imposed, the judge who presided at the trial or before whom the guilty plea was entered shall conduct a separate sentencing hearing to determine the existence or nonexistence of the circumstances set forth in 46-18-303 and 46-18-304 for the purpose of determining the sentence to be imposed. The hearing ~~shall~~ must be conducted before the court alone.

(2) (a) Subject to subsection (2)(b), the sentence must be pronounced and judgment rendered within 90 days after the defendant is found guilty or pleads guilty or within 90 days after the Montana

1 supreme court enters a final decision on appeal.

2 (b) The district court may allow not more than one extension of up to 60 days after entering
3 findings of fact that the extension is necessary to prevent undue hardship to a party."

4

5 **Section 3. Section 46-21-101, MCA, is amended to read:**

6 **"46-21-101. When validity of sentence may be challenged. (1) A person adjudged guilty of an**
7 **offense in a court of record who has no adequate remedy of appeal and who claims that a sentence was**
8 **imposed in violation of the constitution or the laws of this state or the constitution of the United States,**
9 **that the court was without jurisdiction to impose the sentence, that a suspended or deferred sentence was**
10 **improperly revoked, or that the sentence was in excess of the maximum authorized by law or is otherwise**
11 **subject to collateral attack upon any ground of alleged error available under a writ of habeas corpus, writ**
12 **of coram nobis, or other common law or statutory remedy may petition the court that imposed the sentence**
13 **~~or the supreme court~~ to vacate, set aside, or correct the sentence or revocation order.**

14 **(2) If the sentence was imposed by a justice's, municipal, or city court, the petition may not be**
15 **filed unless the petitioner has exhausted all appeal remedies provided by law. The petition must be filed**
16 **with the district court in the county where the lower court is located.**

17 **~~(3) If the person is in custody, the person may elect to file the petition directly with the supreme~~**
18 **~~court."~~**

19

20 **Section 4. Section 46-21-102, MCA, is amended to read:**

21 **"46-21-102. When petition may be filed. A petition for the relief referred to in 46-21-101 may be**
22 **filed at any time within 5 years 1 year of the date of that the conviction becomes final. A conviction**
23 **becomes final for purposes of this chapter when:**

24 **(1) the time for appeal to the Montana supreme court expires;**

25 **(2) if an appeal is taken to the Montana supreme court, the time for petitioning the United States**
26 **supreme court for review expires; or**

27 **(3) if review is sought in the United States supreme court, on the date that that court issues its final**
28 **order in the case."**

29

30 **Section 5. Section 46-21-105, MCA, is amended to read:**

1 **"46-21-105. Amendment of petition -- waiver of grounds for relief.** (1) (a) All grounds for relief
2 claimed by a petitioner under 46-21-101 must be raised in the original or amended original petition. The
3 original petition may be amended only once. At the request of the state or on its own motion, the court
4 shall set a deadline for the filing of the an amended original petition. If a hearing will be held, the deadline
5 must be reasonably in advance of the hearing but may not be less than 30 days prior to the date of the
6 hearing.

7 ~~(b) These grounds for relief not raised in the original or amended petition are waived unless the~~
8 ~~court on hearing a subsequent petition finds~~ The court shall dismiss a second or subsequent petition by a
9 person who has filed an original petition unless the second or subsequent petition raises grounds for relief
10 that could not reasonably have been raised in the original or an amended original petition.

11 (2) When a petitioner has been afforded a direct appeal of the petitioner's conviction, grounds for
12 relief that could reasonably have been raised on direct appeal may not be raised in the original or an
13 amended original petition or in a second or subsequent petition. Ineffectiveness or incompetence of counsel
14 in proceedings on an original or an amended original petition under this part may not be raised in a second
15 or subsequent petition under this part."

16
17 **Section 6. Section 46-21-201, MCA, is amended to read:**

18 **"46-21-201. Proceedings on petition.** (1) (a) Unless the petition and the files and records of the
19 case conclusively show that the petitioner is not entitled to relief, the court shall cause notice of the petition
20 to be served upon the county attorney in the county in which the conviction took place and upon the
21 attorney general and order them to file a responsive pleading to the petition. Following its review of the
22 responsive pleading, the court may dismiss the petition as a matter of law for failure to state a claim for
23 relief or it may ~~grant a prompt hearing on the petition, proceed to~~ determine the issue, and make findings
24 ~~of fact and conclusions with respect to the petition.~~

25 ~~(b) If the death sentence has been imposed, upon receipt of the response or responses to the~~
26 ~~petition, the court shall promptly hold a conference to determine a schedule for the expeditious resolution~~
27 ~~of the proceeding. The court shall issue a decision within 90 days after the hearing on the petition or, if~~
28 ~~there is no hearing, within 90 days after the filing of briefs as allowed by rule or by court order. If the~~
29 ~~decision is not issued during that period, a party may petition the supreme court for a writ of mandate or~~
30 ~~other appropriate writ or relief to compel the issuance of a decision.~~

1 (c) To the extent that they are applicable and are not inconsistent with this chapter, the rules of
2 procedure governing civil proceedings apply to the proceeding.

3 (2) If the death sentence has not been imposed and a hearing is required or if the interests of
4 justice require, the court shall appoint counsel for a petitioner who qualifies for the appointment of counsel
5 under Title 46, chapter 8, part 1.

6 (3) (a) Within 30 days after a conviction for which a death sentence was imposed becomes final,
7 the sentencing court shall notify the sentenced person that if the person is indigent and wishes to file a
8 petition under this chapter, the court will appoint counsel who meets the Montana supreme court's
9 standards for competency of appointed counsel in proceedings under this chapter for an indigent person
10 sentenced to death.

11 (b) Within 75 days after a conviction for which a death sentence was imposed upon a person who
12 wishes to file a petition under this chapter becomes final, the sentencing court shall:

13 (i) appoint counsel to represent the person if the court finds that the person is indigent and either
14 has accepted the offer of appointment or is unable to competently decide whether to accept the offer of
15 appointed counsel;

16 (ii) if the offer is rejected by a person who understands the legal consequences of the rejection,
17 enter findings of fact after a hearing, if the court determines that a hearing is necessary, stating that the
18 person rejected the offer with an understanding of the legal consequences of the rejection; or

19 (iii) if the court finds that the petitioner is not indigent, deny appointment of counsel.

20 (c) The court may not appoint counsel who has previously represented the person at any stage in
21 the case unless the person and the counsel expressly agree to the appointment.

22 (d) Violation of this subsection (3) is not a basis for a claim or relief under this chapter.

23 ~~(3)~~(4) The court, for good cause, may grant leave to either party to use the discovery procedures
24 available in criminal or civil proceedings. Discovery procedures may be used only to the extent and in the
25 manner that the court has ordered or to which the parties have agreed.

26 ~~(4)~~(5) The court may receive proof of affidavits, depositions, oral testimony, or other evidence. In
27 its discretion, the court may order the petitioner brought before the court for the hearing.

28 ~~(5)~~(6) If the court finds in favor of the petitioner, it shall enter an appropriate order with respect
29 to the judgment or sentence in the former proceedings and any supplementary orders as to reassignment,
30 retrial, custody, bail, or discharge as that may be necessary and proper. If the court finds for the

1 prosecution, the petition must be dismissed."
2

3 **NEW SECTION. Section 7. Attorney general petition to supreme court for competency standards.**

4 Within 60 days after [the effective date of this section], the attorney general shall, in compliance with 28
5 U.S.C. 2261, petition the supreme court for a court order establishing standards for competency of counsel
6 appointed to represent indigent persons in proceedings under Title 46, chapter 21, who are sentenced to
7 death. The court may hold appropriate proceedings on the petition, appoint a commission to advise it on
8 competency standards, and adopt standards.
9

10 **NEW SECTION. Section 8. Severability.** If a part of [this act] is invalid, all valid parts that are
11 severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its
12 applications, the part remains in effect in all valid applications that are severable from the invalid
13 applications.
14

15 **NEW SECTION. Section 9. Applicability.** (1) Except as provided in subsection (2), [sections 3
16 through 6] apply to proceedings in which the conviction becomes final:

- 17 (a) after [the effective date of this section]; or
18 (b) during the 12 months prior to the [effective date of this section] if a petition under Title 46,
19 chapter 21, is filed within the 12 months after [the effective date of this section].

20 (2) The provision in [section 6] that the notification must state that counsel to be appointed will
21 meet supreme court standards for counsel applies to petitions for postconviction relief filed after [the
22 effective date of standards adopted under section 7].
23

24 **NEW SECTION. Section 10. Effective dates.** (1) Except as provided in subsection (2), [this act]
25 is effective on passage and approval.

26 (2) The provision in [section 6] that the notification must state that counsel to be appointed will
27 meet supreme court standards for counsel is effective on [the effective date of standards adopted under
28 section 7].
29

-END-

STATE OF MONTANA - FISCAL NOTE

Fiscal Note for HB0222, as introduced

DESCRIPTION OF PROPOSED LEGISLATION:

HB222 adopts standards established for death penalty cases by the federal Antiterrorism and Effective Death Penalty Act of 1996, requires appointment of counsel in post-conviction cases where a death sentence has been imposed; requires the Attorney General to petition the Montana Supreme Court for adoption of competency standards for appointed counsel in such cases; imposes time deadlines for sentencing hearings in death penalty cases; imposes time limits for filing post-conviction petitions and clarifies that second or successive petitions will not be allowed.

ASSUMPTIONS:

1. The Department of Justice (DOJ) Legal Services Division handles all criminal cases on direct appeal to the Montana Supreme Court and in federal court when a convicted person petitions for federal review of the person's conviction or sentence.
2. The case load of new appeal filings in the Appellate Legal Services Bureau increased by more than 60 percent between 1995 and 1996. The Appellate Bureau also opened 70 new post-conviction and habeas corpus case files in calendar year 1996, compared with 36 such filings in 1995 and 56 in 1994. These are cases in which direct appeals to the Montana Supreme Court have already occurred, and the offender seeks further review of the case through the state post-conviction relief statutes or the federal habeas corpus statute.
3. There are currently eight death penalty cases now in various stages of litigation. Death penalty cases are generally long-term cases that require a significantly greater investment of attorney time to process. Appellate attorneys on the Attorney General's staff devoted approximately 1,200 hours to work on death penalty cases in calendar year 1994. From April 1 to May 12, 1995, three attorneys on the appellate staff spent 739 hours on one death penalty case as it approached the final execution date.
4. Under current law the courts control the time lines for completing work on appeals, post-conviction petitions, and habeas corpus petitions. Time periods for completing various stages are set by court rule, but courts retain the discretion to grant extensions of time deadlines. The increase in the case load of appeals and post-conviction and habeas corpus matters in the Appellate Legal Services Bureau has required that the state's attorneys ask for frequent extensions of time deadlines.
5. By adopting the federal standards intended to reduce delay in death penalty cases, the State of Montana will be obligated to meet the new stringent time deadlines for death penalty cases in federal court, which require a petition to be filed within 180 days after state proceedings have concluded and require a final decision by the federal court within 180 days after the petition is filed. The federal law gives the parties only 120 days to complete all actions, including the preparation of all pleadings and briefs and a hearing if necessary.
6. To meet the strict time demands of the legislation, the DOJ would add one attorney (grade 19 at market - \$58,534) and a legal secretary (grade 10 - \$23,596) to the appellate program in October of 1997 and a second attorney (grade 18 - 44,147) in July of 1998 if workload would support a second position. In fiscal 1998, the salaries above are reduced to be at 75 percent due to the October start date.
7. Operating costs are estimated at \$14,615 in fiscal 1998 and \$29,380 in fiscal 1999 (the increase in fiscal 1999 is due to increased travel, communications and computer network charges). Equipment is estimated at \$5,750 in fiscal 1998 and \$2,875 in fiscal 1999 for computers and office equipment.
8. Because the legislation applies to postconviction proceedings, the bill has no fiscal impact to the Department of Corrections.

(Continued)

Dave Lewis 1-17-97
DAVID LEWIS, BUDGET DIRECTOR DATE
Office of Budget and Program Planning

Shiell W. Anderson 1-17-97
SHIELL ANDERSON, PRIMARY SPONSOR DATE

Fiscal Note for HB0222, as introduced

HB 222

FISCAL IMPACT:

<u>Department of Justice:</u>	<u>FY98</u>	<u>FY99</u>
<u>Expenditures:</u>	<u>Difference</u>	<u>Difference</u>
FTE	1.50	3.00
Personal Services	61,598	126,277
Operating Expenses	14,615	29,380
Equipment	<u>5,750</u>	<u>2,875</u>
Total	81,963	158,532
 <u>Funding:</u>		
General Fund (01)	81,963	158,532
 <u>Net Impact on Fund Balance:</u> (Revenue minus Expenses)		
General Fund (01)	(81,963)	(158,532)

In addition, the cost of postconviction proceedings funded from the District Court Criminal Reimbursement Program (general fund statutory appropriation) may increase. This potential increase cannot be estimated.

MINUTES

MONTANA HOUSE OF REPRESENTATIVES 55th LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By CHAIRMAN BOB CLARK, on February 4, 1997, at
7:00 AM, in Room 312-1.

ROLL CALL

Members Present:

Rep. Bob Clark, Chairman (R)
Rep. Daniel W. McGee, Vice Chairman (Majority) (R)
Rep. Diana E. Wyatt, Vice Chairman (Minority) (D)
Rep. Chris Ahner (R)
Rep. Shiell W. Anderson (R)
Rep. Ellen Bergman (R)
Rep. William E. Boharski (R)
Rep. Aubyn A. Curtiss (R)
Rep. Jon Ellingson (D)
Rep. Duane Grimes (R)
Rep. H.S. "Sonny" Hanson (R)
Rep. Joan Hurdle (D)
Rep. Deb Kottel (D)
Rep. Linda McCulloch (D)
Rep. Brad Molnar (R)
Rep. Gerald Pease (D)
Rep. Diane Sands (D)
Rep. Liz Smith (R)
Rep. Loren L. Soft (R)
Rep. Bill Tash (R)

Members Excused: Rep. Boharski excused until 8:00 AM.

Members Absent: Reps. Smith and Molnar absent until 8:00 AM.

Staff Present: John MacMaster, Legislative Services Division
Joanne Gunderson, Committee Secretary

Committee Business Summary:

Hearing(s) & Date(s) Posted:	SB 36, HB 222 POSTED 1/22/97
	HB 321, HB 339 POSTED 1/28/97
Executive Action:	SB 36 BE CONCURRED IN
	HB 268 DO PASS
	HB 321 DO PASS
	HB 44 DO PASS AS AMENDED
	HB 68 DO PASS AS AMENDED
	HB 339 DO PASS AS AMENDED
	HB 273 TABLE

Discussion:

{Tape: 1; Side: A; Approx. Time Count: 40.4 - Tape 1; Side B; 4.2}

Motion: REP. CURTISS moved to segregate amendment #4 for vote.

{Tape: 1; Side: B; Approx. Time Count: 4.3; Comments: REP. CURTISS withdrew the motion.}

Motion: REP. ANDERSON moved substitute amendments.

EXHIBIT 4

{Tape: 1; Side: B; Approx. Time Count: 5.5}

Discussion:

{Tape: 1; Side: B; Approx. Time Count: 7.7 - 16.1; Comments: Further executive action was suspended until the conclusion of hearings.}

HEARING ON SB 36

Opening Statement by Sponsor: SEN. J.D. LYNCH

{Tape: 1; Side: B; Approx. Time Count: 17.1}

Questions From Committee Members and Responses:

{Tape: 1; Side: B; Approx. Time Count: 19.5; Comments: There were no proponents, opponents or informational witnesses. Mr. Greg Petesch from the Code Commission answered committee questions in the absence of SEN. LYNCH.}

Closing by Sponsor:

{Comments: SEN. LYNCH had been excused to attend another committee hearing and did not close.}

HEARING ON HB 222

Opening Statement by Sponsor: REP. SHIELL ANDERSON

{Tape: 1; Side: B; Approx. Time Count: 29.0}

Proponents' Testimony:

JOE MAZUREK, Attorney General

{Tape: 1; Side: B; Approx. Time Count: 32.6; Comments: Urged the committee to table HB 127.}

CHRIS TWEETEN, Attorney General's Office

EXHIBIT 5

{Tape: 1; Side: B; Approx. Time Count: 39.0-Tape 2; Side A; 18.9}

JOHN HARRISON, Former Supreme Court Justice

Opponents' Testimony:

BILL HOOKS, Montana Defender Appellate Office

{Tape: 2; Side: A; Approx. Time Count: 21.0}

JEFFREY RENZ, Assistant Professor

EXHIBIT 6

{Tape: 2; Side: A; Approx. Time Count: 39.8-Tape 2; Side B; 11.5}

SHARON HOFF, Montana Catholic Conference
{Tape: 2; Side: B; Approx. Time Count: 11.7}

RUSSELL HILL, Montana Trial Lawyers Association
{Tape: 2; Side: B; Approx. Time Count: 14.1}

SCOTT CRICHTON, ACLU
{Tape: 2; Side: B; Approx. Time Count: 16.8}

EXHIBIT 7

Questions From Committee Members and Responses:
{Tape: 2; Side: B; Approx. Time Count: 20.0 - Tape 3; Side A;
34.6}

Closing by Sponsor: REP. ANDERSON
{Tape: 3; Side: A; Approx. Time Count: 34.7}

HEARING ON HB 321

Opening Statement by Sponsor: REP. MC CULLOCH EXHIBITS 8 and 9
{Tape: 3; Side: A; Approx. Time Count: 39.7}

Proponents' Testimony:

SCOTT RESTVEDT, Valley Process Server
{Tape: 3; Side: A; Approx. Time Count: 42.6}

EARL ROWE, Bondsman
{Tape: 3; Side: A; Approx. Time Count: 44.0}

DEAN CROW, Valley Process Server
{Tape: 3; Side: B; Approx. Time Count: 0.1}

Questions From Committee Members and Responses:
{Tape: 3; Side: B; Approx. Time Count: 1.5 - 4.0}

Closing by Sponsor: REP. MC CULLOCH
{Tape: 3; Side: B; Approx. Time Count: 4.1}

HEARING ON HB 339

Opening Statement by Sponsor: REP. BILL CAREY
{Tape: 3; Side: B; Approx. Time Count: 4.7}

Proponents' Testimony:

HAROLD HANSER, State DUI Task Force
{Tape: 3; Side: B; Approx. Time Count: 7.7}

BRENDA NORDLAND, Department of Justice EXHIBITS 10, 11 and 12
{Tape: 3; Side: B; Approx. Time Count: 11.7}

DIANNE STANLEY, State DUI Task Force EXHIBITS 13 and 14
{Tape: 3; Side: B; Approx. Time Count: 16.3}

DEPARTMENT OF JUSTICE
HB 222: Reducing Delays in Criminal Cases

Background

State criminal convictions have, from the earliest days of Montana's statehood, been subject to different levels of post-trial review by the courts. Currently three levels of review exist:

- Criminal defendants who are convicted have a right to a **direct appeal** to the Montana Supreme Court under MCA Title 46, ch. 20.
- Defendants also have a right to a separate **post-conviction hearing** under MCA Title 46, ch. 21, once the right to direct appeal ceases to exist, if the offender has new claims that could not have been raised in direct appeal, such as ineffective assistance of counsel.
- Federal law grants the right to file a petition for **writ of habeas corpus** to allow a federal court to review any issues of federal law that have been decided in the course of the state direct appeal or state post-conviction hearing. Federal court review has traditionally been limited by several rules:
 - Only issues of federal law can be reviewed.
 - Only issues that have been litigated or "exhausted" in state court can be brought to federal court for review.
 - Only if the state court decision is based on federal law may a defendant seek review in the federal courts.
 - Defendants cannot raise claims in federal court unless they have followed procedures set by state law for bringing claims before the state courts.

Lengthy Delays

These multiple levels of review create the opportunity for significant delay in achieving finality in state criminal convictions, particularly in death penalty cases. In these cases, the defendant's objective is to prevent, or at least delay as long as possible, the execution of the sentence. For example, Duncan McKenzie's federal habeas corpus petition took almost three years to work its way through federal district court. McKenzie's first federal habeas corpus petition was filed in 1982, and he was ultimately executed in 1995, 13 years later.

New Federal Legislation

In April 1996, Congress passed and the President signed into law changes designed to reduce unnecessary delays in federal habeas corpus proceedings in death penalty cases. The changes require that the states take certain actions to ensure that their post-conviction review procedures provide defendants an adequate opportunity to secure a full and fair review of all claims. For states that take these actions, federal courts will be required to meet specific and much shorter time limits for making decisions in death penalty cases.

HB 222 takes advantage of these changes in federal law by "opting in" to the federal legislation for review of Montana's death penalty cases. Several steps need to be taken to "opt in":

- The State must guarantee the right to counsel in post-conviction cases involving the death penalty. HB 222 makes this right in death penalty cases explicit, and creates procedures for the orderly appointment of competent counsel.
- The State must establish minimum standards for the competency of attorneys who represent death penalty defendants in state post-conviction proceedings. HB 222 accomplishes this by requiring the Attorney General to petition the Montana Supreme Court for the adoption of such standards.
- The State must guarantee compensation for attorneys appointed to represent defendants in state post-conviction proceedings. Montana has already addressed this issue through the creation of the district court reimbursement fund. HB 222 incorporates existing procedures for payment of defense counsel.

Necessary Staff Resources

To realize the benefits of HB 222, the State must be able to comply with the relatively short time limits that will exist in both state and federal post-conviction proceedings. At current staffing levels, this will not be possible in Montana.

The caseload in the Appellate Legal Services Bureau in 1996 increased by 60 percent over that for 1995. The eight attorneys in that bureau now routinely have as many as 11 briefs and responses due in one month. Because of the heavy caseload, extensions of time deadlines are now routine. Such extensions will not be allowed in cases that are governed by the new deadlines.

Funding

HB 222 will require funding of \$234,000 for additional staff in the appellate section of the Attorney General's office to meet the growing caseload and ensure that the time limits that will apply to state death penalty cases can be met. These funds will allow one attorney and secretary to be hired in the first year of the biennium, and an additional attorney in the second year if the workload justifies additional legal staff.

Through changes like the "truth in sentencing" law strongly supported last session, Montanans have made it clear that they want the sentences imposed on criminals carried out. However, putting more people in prison and imposing longer sentences result in more legal challenges. This funding will assure that the Department of Justice has the legal staff necessary to see that criminal sentences are upheld.

DEPARTMENT OF JUSTICE

HB 222: Reducing Delay in State Courts

In an effort to avoid lengthy and costly delays in death penalty cases, HB 222 allows Montana to opt in to the federal legislation that established deadlines for federal court review of state cases. HB 222 also takes the following steps to eliminate opportunities for unnecessary delay in state post-conviction proceedings:

Current Law

- sets no time limit for imposing a death sentence. In one Montana death penalty case, the sentencing judge delayed resentencing after remand from the Montana Supreme Court for a full year.
- provides the defendant with the option to file a petition directly in the Montana Supreme Court. If factual issues are raised in a petition filed in the Supreme Court, remand is required for fact-finding proceedings in district court.
- allows a defendant to delay for five years after conviction before filing a post-conviction petition in state court.
- is not sufficiently clear in preventing litigation of issues in a second post-conviction petition that were or could have been litigated in the first petition.
- includes no time limits on a court's handling of post-conviction cases.

HB 222

- requires that a death sentence be imposed within 90 days after conviction or remand for resentencing. While this would allow reasonable preparation time, the bill would allow a single 60-day extension beyond the 90-day limit in extraordinary cases.
- creates a single method of proceeding, requiring that all post-conviction petitions be filed initially in the district court. This will eliminate delay in those cases where factual issues need to be determined, a category which includes many of the death penalty cases.
- reduces the time to one year, to run from the time the right of appeal expires or, if a direct appeal is taken, the time proceedings on the direct appeal are concluded.
- requires a court to dismiss a second petition that raises issues that either were or could have been raised in an earlier petition. The bill makes it clear that ineffectiveness of counsel in the post-conviction stage of a case is not grounds for relief from a criminal conviction.
- requires a court in a death penalty post-conviction case to issue a scheduling order and to issue a decision on the petition within 90 days after the hearing on the petition or the filing of written arguments if no hearing is held. If no decision is issued, a party to the case may petition the Supreme Court for a writ to compel a decision.

THE POST-TRIAL PROCESS OF A CRIMINAL CASE

Process begins with a
Conviction

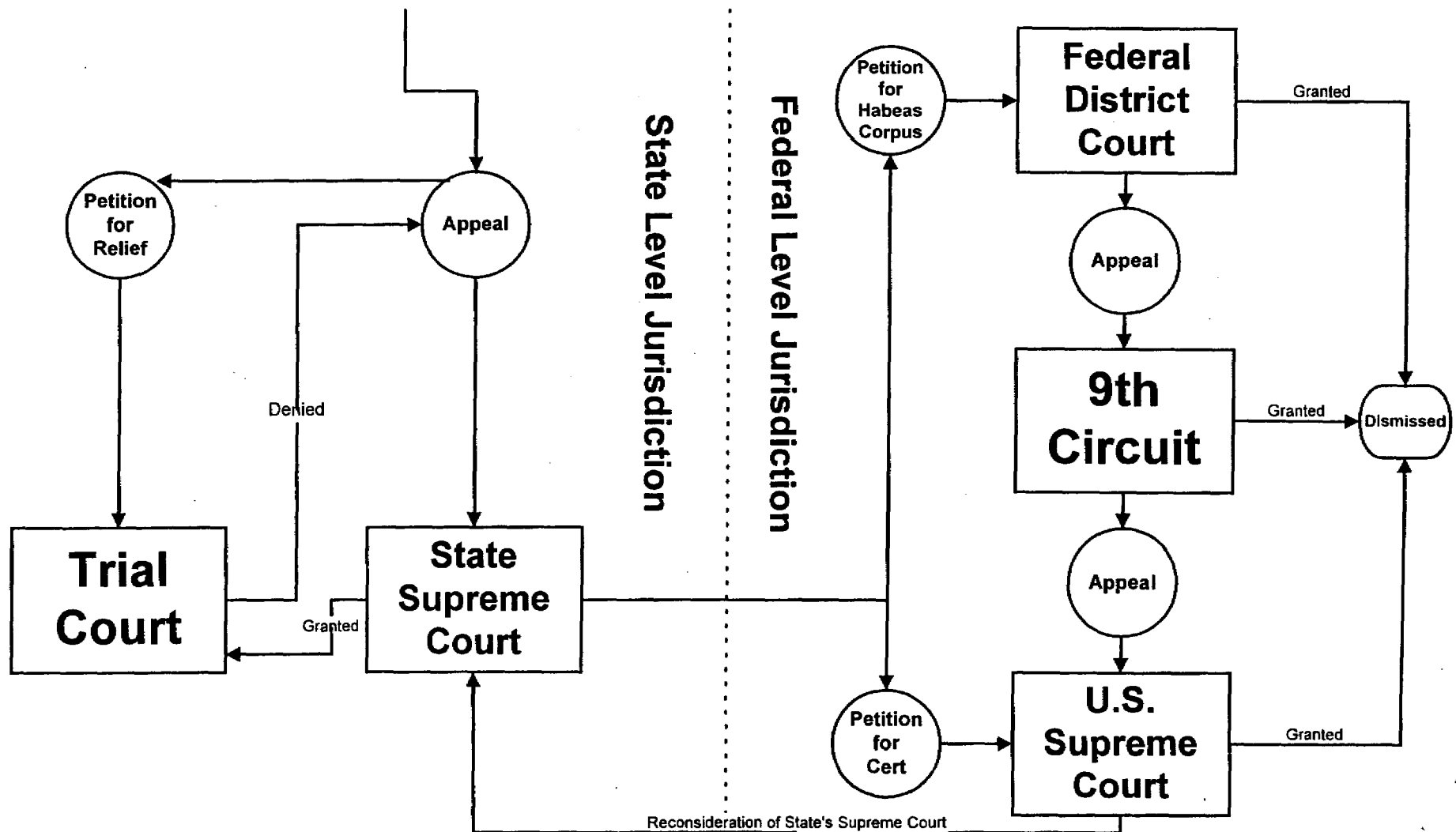


EXHIBIT 6
DATE 2/4/97
HB 222

MEMORANDUM

TO: Members of the House Judiciary Committee; Rep. Sheill Anderson
FROM: Prof. Jeffrey T. Renz
RE: HB 222; HB 127 (Montana Post Conviction Hearing Act Amendments)
DATE: January 22, 1997

* * * * *

I. Identity of Commentor.

I am an assistant Professor at the School of Law at The University of Montana. I am the Director of the Montana Defender Project, which, since 1966, has provided assistance to inmates in post-conviction proceedings, among other things. I am the author of "Post Conviction Relief in Montana," which was published in 1994.¹ I teach the subject of post-conviction relief to students at the Law School.

II. General Comments Regarding HB 127.

I note that HB 127 is cast as an "Act Adopting Standards Established for Death Penalty Cases by the Federal Anti-terrorism and Effective Death Penalty Act of 1966. . . ." Very little of HB 127 addresses the requirements of the Federal Law.

The Post-conviction Hearing Act was adopted by the Montana Legislature in 1967 to provide a uniform method by which prisoners could challenge the legality of their conviction or confinement. Up to that time, a number of prisoners had been tried and confined without benefit of counsel. Some were innocent. The courts developed ad hoc procedures by which these prisoners could challenge their convictions. The Post-conviction Hearing Act was intended to consolidate these procedures into a simple, understandable method to attack unlawful or unjust convictions.

In the period following 1967, numerous prisoners were successful in overturning their convictions, whether because they were innocent or because they had been railroaded. As Montana's courts adjusted to new criminal procedure rules, the number of successful challenges tended to decline.

Notwithstanding that decline, the Post-conviction Hearing Act remains important to the administration of justice. Each year the Montana Defender Project obtains the release of 10-12 prisoners who are confined illegally or unjustly. We obtain the release of many of these prisoners through post-conviction proceedings. In the past three years, these have included prisoners:

- sent to prison without the benefit of counsel;²

- serving a prison sentence because of typographical errors in their sentence;³
- who had obtained an earlier court order directing their re-trial, which was then ignored by the state;⁴
- confined or returned to prison because the prison had miscalculated how much time they were required to serve;⁵
- confined in prison beyond the end of their sentence because the prison knowingly ignored existing law;⁶
- sent to prison under a law that was not in existence at the time they were charged.⁷

These examples sound harsh and unbelievable, but they are true and they are documented in our files. This illustrates the importance of the post-conviction remedy. The amendments curtail the remedy, a matter I address next.

III. HB 127 Analyzed.

- A. Section 3, Amending Mont. Code Ann. § 46-21-101. (*Barring Petitions from City and Justice Courts and Barring Petitions Direct to the Montana Supreme Court*).

Section 3 amends the Post-conviction Hearing Act in two key ways. First, it eliminates post-conviction relief from the wrong-doing of a Justice of the Peace, City Judge, or Municipal Judge. Second, it eliminates the remedy of a direct petition to the Montana Supreme Court. Neither amendment is advisable.

1. The Elimination of Post-conviction Relief From City and Justice Court.

The first amendment in Section 3 seeks vindication for the Attorney General's loss in State v. Christensen, 265 Mont. 374 (1994). Christensen held that a city court defendant may seek post-conviction relief in the district court. Section 3 eliminates that remedy. Section 3 prohibits post-conviction relief from a JP court, city court, or municipal court conviction unless the petitioner has exhausted appeal remedies. Since appeals from these courts are appeals "de novo," meaning the case starts out fresh in district court, the only conviction that will remain after an appeal will be that from district court. This doesn't make sense for two reasons:

First, post-conviction relief permits the District Court to correct the narrow error

arising from city or JP court injustice. The amendment would impose the costs of a new trial on both the state and the defendant. I suggest that the Committee retain the scalpel that represents the current law rather than the bludgeon that the Attorney General recommends.

Second, we know from some unhappy experiences with Justices of the Peace and City Court judges (oddly, all from Yellowstone County) that we need effective remedies from abuses by a court. See, State v. Mora, 922 P.2d 516 (1996) (holding that the Justice of the Peace could not impose two successive sentences); City of Billings v. Layzell, 242 Mont. 145 (1990) (condemning city judge's practice of setting bail to fit the fine and imposing massive costs for an appeal); Rivera v. Eschler, 235 Mont. 350 (1989) (reversing J.P.'s "modification" of a final sentence). These were reported cases. When I was in practice I brought two habeas proceedings obtaining the release of people jailed improperly by Justices of the Peace in Yellowstone County.

The practical effect of the proposed amendment is to preserve unquestionably illegal convictions or sentences.

2. The Elimination of Petitions Direct to the Montana Supreme Court.

The second amendment in Section 3 eliminates petitions direct to the Montana Supreme Court. This amendment doesn't make good sense, either.

At the Montana Defender Project, I apply some general rules with respect to post-conviction petitions. First, if we can correct the injustice informally, with the agreement of the County Attorney, we do so. Second, if we must go to court, all petitions that raise issues of fact that will require a hearing at which evidence is offered are filed at the district court level. Petitions that raise only issues of law are filed at either the district court level or in the Montana Supreme Court. Two considerations govern the place where we file: time and chances. Some district judges have permitted petitions to languish for years, notwithstanding our entreaties to them. When a prisoner is in prison unlawfully and deserves immediate release, we cannot allow his petition to languish beyond our control. That case is filed directly to the Montana Supreme Court, since we then obtain our client's quick release.

When we want "two bites of the apple" we file in the district court. This reason is probably the best example why the proposed amendment makes no sense. If I have a meritorious case on the law and lose, I am going to appeal. Since we accept only cases that we feel have merit, it means those cases always end up at the Montana Supreme Court. The same occurs when the State loses. So this amendment ensures that two courts, not one, will address cases that raise legal issues only. It doubles the State's costs in a given case, unnecessarily, by requiring all litigants, even those who have clear-cut legal issues, to begin

in the district court.

B. Section 4, Amending Mont. Code Ann. § 46-21-102. (*Arbitrary Time Limits*).

The changes included in Section 4 limit the time in which a post-conviction petition may be filed to one year following a conviction. The Committee not only should not adopt this amendment, it should eliminate any time limitations for filing.

The amendment ignores recent developments in forensic DNA testing. These developments persuade me that numerous prisoners in Montana State Prison are there for crimes that they did not commit. Here is what I have learned:

The FBI's DNA lab has reported that, over several years, between 25% and 33% of the **PRIMARY** suspects in sex assault and rape cases are excluded as suspects by DNA testing. This means that the local police have decided that the guy did it and, nearly always, the victim has identified the guy as the rapist. Put another way, the FBI's reports demonstrate that one of four eyewitness identifications are in error.

Experience tells me that most of those suspects excluded by DNA testing would be wrongly convicted had the DNA test not excluded them as defendants. Montana's first reported case involving DNA evidence was brought in 1993. If the FBI's numbers are correct, and we must conclude that they are since they are consistent from year to year, it means that we have a number of innocent people in prison as a result of a faulty eyewitness identification. DNA typing is, for the first time, giving us the opportunity to identify and release these poor souls.

Another set of facts. In 1995 the Department of Justice conducted a study of prisoners who were convicted and later exonerated by DNA tests.⁸ Of these defendants, over 20 per cent had "confessed" or given some other damning statement. All but one were identified by the victim, other witnesses or both. One defendant, who had a mental defect, plead guilty with the advice of counsel. Three-fourths of these unfortunates spent over five years in prison or on death row before they obtained their release.

It is very, very difficult for people like these to get their cases reconsidered. They have no money, and therefore cannot afford to hire a lawyer or pay for their own DNA analysis. They have to find a program or lawyers willing to invest their resources in obtaining their release. In order to do so, they must persuade the lawyer of their innocence, often, as can be seen in the examples, in the face of persuasive trial evidence. This means that a great deal of time passes for them before they can obtain assistance.

In Montana, we are only just beginning to realize the benefit of DNA analysis. More significantly, we are only beginning to discover that some serious wrongs were

committed in recent years. William Hooks was only last year appointed to represent Chester Bauer, a man who was convicted after the Forensic Laboratory misplaced samples of his hair and then appeared and testified falsely that a hair sample (not connected to the case) was his. It appears that DNA testing will exonerate Bauer, but he has remained in prison since 1985.

From 1967 to 1981, there was no arbitrary time limitation for the filing of a post-conviction petition. Our courts developed a common sense rule for considering late filings of cases. If a petition was filed and too much time had passed to permit justice to be done in that particular case, the petition was dismissed as untimely.⁹ The Court articulated a rule that made sense and that rendered justice. An arbitrary deadline means that our courts will not be able to consider cases in which DNA testing proves unequivocally that a prisoner is innocent. Arbitrary time limits represent a technical defense to a case in which a court has unquestionably violated the law. An arbitrary deadline permits the Attorney General to thumb his nose at a prisoner who has no business being confined.

The American Bar Association, whose members include prosecutors and defense lawyers, recommends against fixed limitations periods.¹⁰ The Uniform Law Commissioners, who drafted the Uniform Post-conviction Procedure Act, also criticize such procedural barriers.¹¹ The effect of these procedural bars appears in the Department of Justice's report. Of the men who were exonerated, a significant number could not obtain relief in their state courts because of the passage of time, a bar to amendments, and similar procedural barriers. The Report recommends, "As DNA testing to exculpate convicted persons becomes more widespread, States need to consider these issues."

C. Section 6, Amendments to Mont. Code Ann. § 46-21-105. (*Barring More than One Amendment to a Petition*).

The proposed amendments seek to prevent the filing of subsequent petitions or amended petitions for post-conviction relief. The Committee should reject them and go further and strike language limiting amendment that is currently in the statute.

As I mentioned, many prisoners who are in prison because the state violated the law or notwithstanding their innocence, stupidly try to represent themselves. Many of them are taken advantage of by so-called jailhouse lawyers who draft and file junk under the title, "Post-conviction Petition." Once this has happened, the prisoner is out of luck. Lacking counsel, he is meat for the Attorney General's grinder. When he finally does find someone who will represent him competently under the current law and the amendments proposed in this section it is too late for him.

Our courts have recognized this problem and opened the courthouse door a crack so that the most compelling cases are heard. It is this little crack that the Attorney General

seeks to close with this amendment. As an example, Chester Bauer, who I mentioned above, would be barred by this provision, even though he is innocent.

A 1993 change to the Post-conviction Hearing Act restricted a petitioner to one amendment to his petition. This makes no sense. After a petition is filed we begin to learn some amazing things about the case. In the case of Fred Perry, Perry's lawyer learned that the prosecution had hidden evidence that proved Perry's innocence only after he had begun the post-conviction process. This is where the amendment comes into play. When you file a post-conviction petition, you set out the wrongs that you know about. When you discover new ones, as in Perry's case, you amend the petition to include them. A one amendment rule means that an unscrupulous prosecutor can get away with violations of the law and condemn an innocent person to prison.

These amendments add a twist to Sir William Blackstone's rule:

"It is better to let one innocent person rot in prison than to hear ten amended petitions."

D. Section 6, Amendments to § 46-21-201. (*Rules of Civil Procedure*).

This contains a change I recommend. The amendment, among other things, provides that the rules of civil procedure apply. Applying the rules of civil procedure permits us to use commonly understood approaches to preparing and trying these cases.

IV. General Observations.

The Committee should note that the amendments that I have addressed have nothing to do with the Federal Anti-terrorism and Effective Death Penalty Act. The Committee should also note that the Federal Act is an unfunded mandate. It requires the state to ensure that competent counsel are employed and paid in death penalty cases, but provides no funding for that purpose.

Those provisions of HB 127 that seek to hurry up the process that we follow when we kill a prisoner are subject to the same criticism I have set forth above. I cannot believe that a member of this Committee would knowingly pull the lever to kill a prisoner that you believed to be innocent. Yet by hastening the time to execution we ensure that we will kill a prisoner who is innocent. Speedy processes are not worth the death of one innocent human being.

¹ Renz, Post-Conviction Relief in Montana, 55 Mont. L. Rev. 321 (1994).

² State v. Aul; State v. Losacano.

3 State v. Beddow.

4 State v. Moran.

5 State v. Cattnach.

6 State v. Skjold.

7 State v. Richards; State v. Sean Smith.

8 U.S. Dept. of Justice, *Convicted by Juries, Exonerated by Science: Case Studies in
the Use of DNA Evidence to Establish Innocence After Trial* (1996).

9 State v. Standley, 192 Mont. 54 (1981).

10 IV ABA Standards for Criminal Justice 22-2.4(a) (2d Ed. Supp. 1986).

11 Uniform Post-conviction Procedure Act § comments (1993 Supp.).



EXHIBIT 7
DATE 2/4/97
HB 222

P.O. BOX 3012 • BILLINGS, MONTANA 59103 • (406) 248-1086 • FAX (406) 248-7763

February 4, 1997

Mr. Chairman, Members of the Committee:

For the record, I am Scott Crichton, Executive Director of the American Civil Liberties Union of Montana, here in opposition to HB 222, legislation imposing a time limit for a sentencing hearing in a death penalty case and revising laws pertaining to post-conviction proceedings.

This bill is captioned as an Act Adopting Standards Established for Death Penalty Cases by the Federal Anti-Terrorism and Effective Death Penalty Act of 1966." This is a misleading statement. The federal act, on habeas review, would and does only become applicable in Montana if the Montanan legislature establishes by statute or the Montana Supreme Court establishes by a rule a mechanism for appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State post-conviction proceedings brought in state court and does require the establishment of standards of competency for the appointment of counsel in those proceedings. The federal litigation does not mandate a time limit for sentencing in a death penalty case hearing or a one year time limit for a petition for post-conviction relief proceedings. The ACLU would not oppose compliance with the federal law with regard to the appointment of counsel and the establishment of competency standards for said appointed counsel. The ACLU, however, does oppose the time limits for sentencing proposed in this legislation and some of the revisions pertaining to post-conviction proceedings.

In almost every death penalty case in Montana, the defendant is an indigent person, who has appointed counsel. Appointed counsel in these cases usually starts with the local public defender in each county or a judicial district. Unfortunately, those public defenders, while dedicated attorneys, do not have the necessary competency to be involved in a death penalty case. The United States Supreme Court has said that, for there to be effective representation, a defendant must be represented by an attorney who has experience in capitol cases and by two attorneys. In Montana, there are few lawyers who have experience in death penalty cases that meet the requirements under the law. If it is the goal of this legislation to have death penalty convictions and death penalty sentences upheld and not overturned, the legislature should adopt a means for the appointment and compensation of qualified capitol case counsel in every pending case in Montana. This means making such counsel available for the trial of the case and not simply post-conviction proceedings. One area in which most death penalty convictions and sentences are overturned, as well as litigated, is based on an argument made in post-conviction proceedings or in habeas proceedings of in-effective representation of counsel.

Such claims, in Montana, would not likely prevail if this legislature took the necessary steps to adequately compensate competent counsel and to make qualified counsel available, on a state-wide basis, to assist all of the public defenders in this State who do not have the necessary qualifications.

The biggest problem with this legislation is the 90 day time limit for the pronouncement of sentence after a finding of guilty. If this legislation passes, attorneys representing defendants in potential death penalty cases will have to, while getting ready to try the case, be getting ready for the aggravation and mitigation hearing which must follow after a finding of guilty and before a death sentence can be imposed. Such a procedure is going to lead to a very strained relationship between a defendant and his counsel. While the defendant is not free to get rid of a court appointed counsel, the defendant would be asking a trial judge, almost every day, if during the process of getting ready for trial, counsel is also discussing issues to be argued and to be raised in an aggravation and mitigation hearing, after such trial. This is because the defendant then would decide that lawyer doesn't believe him and would not adequately represent him because he doesn't believe him. The only way that defense counsel can competently and adequately represent a defendant is to have the freedom of getting ready for trial before the trial and the issues to be dealt with during a trial, without worrying about a future aggravating and mitigating hearing pertaining to the death penalty. If the defendant is found guilty, counsel can then put his attention on getting ready for that aggravating and mitigating hearing. With this 90 day time period, counsel who does not prepare for the aggravating and mitigating hearing, prior to the trial and during trial, would be subject to in-effective assistance claims, as to the sentencing phase of the case in later post-conviction proceedings and counsel who does get ready would then be subject to in-effective assistance claims, as to the trial of the case. These claims could prevail because this is the same issue that is litigated, in these cases, in post-conviction proceedings more than any other issue.

The other problem with the 90 day time limit is that by imposing such a time limit, the legislature would then give individuals who received the death penalty another argument to make about the unconstitutionality of their death sentence. It should be anticipated that defendants in these cases, would argue that their rights to due process have been violated due to the unreasonable 90 day time limit. It cannot be predicted how these arguments will come out. However, since defendants do have a liberty interest involved, the courts would review such due process arguments very carefully.

The 90 day time limit is also unreasonable. Counsel, in death penalty cases, after a plea of guilty or a conviction by jury, need time to investigate the defendant's background, to develop mitigating evidence, and as well, to prepare for the State's evidence of aggravation. This 90 day period just doesn't allow enough time for all of that. By comparison, the new federal statute allows federal courts 180 days to reach a decision on

a habeas petition. Montana judges would be required to reach a decision, as to whether to impose a death sentence, in a much shorter time and would be required to decide it immediately if the aggravation and mitigation hearing occurred on the 89th day.

Existing Montana law 48-18-115, specifies that court is to conduct a sentencing hearing, without unreasonable delay. However, subsection (2) of this statute requires a hearing on aggravation and mitigation if the death penalty is being considered. Subsection (1) also requires a court to afford all the parties an opportunity to be heard on any matter relevant to sentencing. It is the ACLU's belief that this provision in the law, which says that sentencing shall occur without unreasonable delay is sufficient to satisfy anyone's concern that it is taking too long between a jury verdict or a guilty plea in the ultimate sentencing.

The ACLU would ask the legislature to amend this legislation by deleting the 90 day requirement for imposition of sentence and continue with existing law that sentence be imposed without unreasonable delay.

The other objection that the ACLU would have to this proposed legislation is the change from five years to one year for the time period in which a petition for post-conviction relief can be filed. This one year time period, like the 90 day provision, simply isn't enough time. The federal Anti-Terrorism Act and Effective Death penalty Act, as well as this legislation, requires the appointment, in a death penalty case, of new counsel for the defendant other than the counsel who tried the case. Such new counsel would have to have time to become familiar with the case and, with a limitation to be able to only file one original petition and an amended petition, counsel would simply not have enough time, in one year, to adequately review the record; discuss the case with his client; interview potential witnesses; and, review the ever changing law on the death penalty.

One of the other apparent problems with the one year time limit deals with getting counsel appointed or having a determination made that the defendant does not desire the appointment of counsel. It usually takes a court a substantial amount of time to find new counsel to be appointed and to find counsel who is willing to accept these kinds of appointments in a death penalty case.

This legislation is not mandated by the federal law. However, if the legislature believes changes need to be made in Montana, the legislature rather than limiting the time for imposing sentence and for review of those sentences should make it possible for defendants, in potential death cases, to be adequately and competently represented so that, if the death penalty is imposed, the same would not likely be overturned on the basis of arguments about in-effective assistance which arguments have been effective in Montana for years and elsewhere for years.

HOUSE OF REPRESENTATIVES

7 AM

JUDICIARY COMMITTEE

ROLL CALL

DATE 2/1/97

NAME	PRESENT	ABSENT	EXCUSED
REP. BOB CLARK, CHAIRMAN	✓		
REP. DANIEL MC GEE, VICE CHAIR	✓		
REP. DIANA WYATT, VICE CHAIR	✓		
REP. CHRIS AHNER	✓		
REP. SHIELL ANDERSON	✓		
REP. ELLEN BERGMAN 7:10	✓		
REP. WILLIAM BOHARSKI 8:05	✓		✓
REP. AUBYN CURTISS	✓		
REP. JON ELLINGSON 7:15	✓		
REP. DUANE GRIMES	✓		
REP. H.S. "SONNY" HANSON 7:10	✓		
REP. JOAN HURDLE	✓		
REP. DEB KOTTEL	✓		
REP. LINDA MC CULLOCH	✓		
REP. BRAD MOLNAR 8:05	✓		
REP. GERALD PEASE	✓		
REP. DIANE SANDS	✓		
REP. LIZ SMITH 8:00	✓		
REP. LOREN SOFT	✓		
REP. BILL TASH	✓		

HOUSE OF REPRESENTATIVES
VISITORS REGISTER

JUDICIARY

COMMITTEE

DATE 2/4/97

BILL NO. HB 232 SPONSOR(S) Rep. Anderson

PLEASE PRINT

PLEASE PRINT

PLEASE PRINT

NAME AND ADDRESS	REPRESENTING	Support	Oppose
JEFF RENZ, Clinton	—		✓
Bill Hooks Helena	—		—
Pam Collins Helena ^{office} Ag. →		✓	
Joe Mazurek Helena	AG's Office	✓	
John G. Harrison "	" "	✓	
Chris Tweeten	Attorney General / DOJ	✓	
Scott Caruth	NLU		✓
Sharon Hagg	MT Catholic Cong		✓
Russell B Hill	MT Trial Lawyers		✓

PLEASE LEAVE PREPARED TESTIMONY WITH SECRETARY. WITNESS STATEMENT FORMS ARE AVAILABLE IF YOU CARE TO SUBMIT WRITTEN TESTIMONY.

HR:1993

wp:visssbcom.man

CS-14

MINUTES

MONTANA HOUSE OF REPRESENTATIVES 55th LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By CHAIRMAN BOB CLARK, on February 10, 1997, at 8:00 AM, in Room 312-1.

ROLL CALL

Members Present:

Rep. Bob Clark, Chairman (R)
Rep. Daniel W. McGee, Vice Chairman (Majority) (R)
Rep. Diana E. Wyatt, Vice Chairman (Minority) (D)
Rep. Chris Ahner (R)
Rep. Shiell W. Anderson (R)
Rep. Ellen Bergman (R)
Rep. William E. Boharski (R)
Rep. Aubyn A. Curtiss (R)
Rep. Jon Ellingson (D)
Rep. Duane Grimes (R)
Rep. H.S. "Sonny" Hanson (R)
Rep. Joan Hurdle (D)
Rep. Deb Kottel (D)
Rep. Linda McCulloch (D)
Rep. Brad Molnar (R)
Rep. Gerald Pease (D)
Rep. Diane Sands (D)
Rep. Liz Smith (R)
Rep. Loren L. Soft (R)
Rep. Bill Tash (R)

Staff Present: John MacMaster, Legislative Services Division
Joanne Gunderson, Committee Secretary

Committee Business Summary:

Hearing(s) & Date(s) Posted: HB 292, HB 416, HB 415
POSTED 2/5/97
Executive Action: HB 163 TABLED
HB 243 DO PASS AS AMENDED

HEARING ON HB 292

Opening Statement by Sponsor: REP. EDWARD J. "ED" GRADY
{Tape: 1; Side: A; Approx. Time Count: 1.4} **EXHIBIT 1**

Proponents' Testimony:

LARRY CLIFFORD, East Helena Police
{Tape: 1; Side: A; Approx. Time Count: 1.0}

Further Proponents:

DUANE SPETHMAN

{Tape: 2; Side: B; Approx. Time Count: 36.7 - end of tape}

RICHARD OVERCAST

{Tape: 3; Side: A; Approx. Time Count: 0.1}

Questions From Committee Members and Responses:

{Tape: 3; Side: A; Approx. Time Count: 1.0 - 38.2; Comments:
Exhibits 10 and 11 were distributed during the question portion
of the hearing.} EXHIBITS 10 and 11

Closing by Sponsor: REP. CURTISS

{Tape: 3; Side: A; Approx. Time Count: 38.3}

EXECUTIVE ACTION ON HB 163

Motion: REP. BOHARSKI moved HB 163 DO NOT PASS.

{Tape: 3; Side: B; Approx. Time Count: 0.1; Comments: REP. MC GEE
assumed the chair.}

Discussion:

{Tape: 3; Side: B; Approx. Time Count: 1.2 - 6.3; Comments:
Exhibit was distributed during the discussion period.} EXHIBIT 12

Motion/Vote: REP. DEB KOTTEL moved to table HB 163. The motion
carried 19 - 1, REP. MC CULLOCH voting no. (REPS. HANSON, AHNER,
CLARK, TASH, and WYATT voted aye by proxy.)

EXECUTIVE ACTION ON HB 222

Motion: REP. SHIELL ANDERSON moved HB 222 DO PASS.

{Tape: 3; Side: B; Approx. Time Count: 10.9}

Motion/Vote: REP. GRIMES moved to amend HB 222. EXHIBIT 13
The motion carried by unanimous voice vote.

Motion: REP. ANDERSON moved HB 222 DO PASS AS AMENDED.

{Tape: 3; Side: B; Approx. Time Count: 12.6}

Discussion:

{Tape: 3; Side: B; Comments: The tape machine was unplugged, time
count no longer accurate for Tape 3, Side B.}

Motion: REP. KOTTEL moved to amend HB 222.

Discussion:

{Tape: 3; Side: B; to Tape 4; Side A; 1.1 Comments: This set of
minutes is completed on a 60-minute tape. Chairman Clark resumed
the chair.}

Motion: REP. SMITH moved a substitute amendment changing the number of days of elapsed time from 180 to 120 and retain lines 2 and 3 on page 2.

{Tape: 4; Side: A; Approx. Time Count: 3.2}

Discussion:

{Tape: 4; Side: A; Approx. Time Count: 7.1 - 11.9}

Vote: The motion failed by voice vote. (REP. WYATT voted by proxy.)

Discussion:

{Tape: 4; Side: A; Approx. Time Count: 12.4; Comments: The chairman postponed further action until 7 AM the next day.}

MOTION/VOTE: REP. MC GEE MOVED TO ADJOURN. THE MOTION CARRIED by unanimous voice vote.

EXHIBIT 13
DATE 2/10/97
HB 222

Amendments to House Bill No. 222
First Reading Copy

Requested by Rep. Anderson
For the Committee on the Judiciary

Prepared by John MacMaster
February 6, 1997

1. Page 2, line 21.
Strike: "A"
Insert: "(1) Except as provided in subsection (2), a"
2. Page 2, line 24.
Strike: "(1)"
Insert: "(a)"
Renumber: subsequent subsections
3. Page 2, line 29.
Insert: "(2) A claim that alleges the existence of newly discovered evidence that, if proved and viewed in light of the evidence as a whole would establish that the petitioner did not engage in the criminal conduct for which the petitioner was convicted, may be raised in a petition filed within 1 year of the date on which the conviction becomes final or the date on which the petitioner discovers, or reasonably should have discovered, the existence of the evidence, whichever is later."

MINUTES

MONTANA HOUSE OF REPRESENTATIVES 55th LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By CHAIRMAN BOB CLARK, on February 11, 1997, at 7:00 AM, in Room 312-1.

ROLL CALL

Members Present:

Rep. Bob Clark, Chairman (R)
Rep. Daniel W. McGee, Vice Chairman (Majority) (R)
Rep. Diana E. Wyatt, Vice Chairman (Minority) (D)
Rep. Chris Ahner (R)
Rep. Shiell W. Anderson (R)
Rep. Ellen Bergman (R)
Rep. William E. Boharski (R)
Rep. Aubyn A. Curtiss (R)
Rep. Jon Ellingson (D)
Rep. Duane Grimes (R)
Rep. H.S. "Sonny" Hanson (R)
Rep. Joan Hurdle (D)
Rep. Deb Kottel (D)
Rep. Linda McCulloch (D)
Rep. Brad Molnar (R)
Rep. Gerald Pease (D)
Rep. Diane Sands (D)
Rep. Liz Smith (R)
Rep. Loren L. Soft (R)
Rep. Bill Tash (R)

Members Excused: REP. WYATT, REP. BOHARSKI and REP. TASH were excused until 8:00 AM.

Staff Present: John MacMaster, Legislative Services Division
Joanne Gunderson, Committee Secretary

Committee Business Summary:

Hearing(s) & Date(s) Posted: HB 389, HB 419, HB 411, HB 401
POSTED 2/5/97
Executive Action: HB 222 DO PASS AS AMENDED
HB 292 DO PASS AS AMENDED
HB 401 DO PASS AS AMENDED
HB 411 DO PASS AS AMENDED
HB 276, 306, 419, 389 TABLED

EARL ROWE, Bail Bondsman

{Tape: 3; Side: A; Approx. Time Count: 39.9}

Opponents' Testimony:

BOB GILBERT, Montana Magistrates Association

{Tape: 3; Side: A; Approx. Time Count: 40.6; Comments: Opposed time allotment.}

JOHN CONNOR, Montana County Attorneys Association

{Tape: 3; Side: A; Approx. Time Count: 41.6; Comments: Opposed time allotment.}

Questions From Committee Members and Responses:

{Tape: 3; Side: B; Approx. Time Count: 0.2 - 7.4}

Closing by Sponsor: REP. BARNETT

{Tape: 3; Side: B; Approx. Time Count: 7.5}

EXECUTIVE ACTION ON HB 222

Motion/Vote: REP. ANDERSON moved HB 222 DO PASS AS AMENDED. The motion carried 11 - 8; REPS. WYATT, SANDS, MC CULLOCH, PEASE, ELLINGSON, HURDLE, BOHARSKI and KOTTEL voting no. (REP. KOTTEL voted by proxy, REP. BERGMAN was not present for the vote.)
{Tape: 3; Side: B; Approx. Time Count: 12.1}

EXECUTIVE ACTION ON HB 419

Motion: REP. ANDERSON moved HB 419 DO PASS.
{Tape: 3; Side: B; Approx. Time Count: 14.5}

Discussion:

{Tape: 3; Side: B; Approx. Time Count: Not recorded}

Motion: REP. ELLINGSON moved to amend HB 419 by striking subsection e on line 20, page 1.

Discussion:

{Tape: 3; Side: B; Approx. Time Count: Not recorded}

Motion/Vote: REP. MC GEE moved to table HB 419. The motion carried 19 - 0. (REP. KOTTEL was not present for the vote.)

{Tape: 3; Side: B; Approx. Time Count: 23.0 - 24.1; Comments: Committee discussion and point of personal privilege by REP. AHNER.}

EXECUTIVE ACTION ON HB 389

Motion: REP. BOHARSKI moved HB 389 DO NOT PASS.
{Tape: 3; Side: B; Approx. Time Count: 24.2}



HOUSE STANDING COMMITTEE REPORT

February 11, 1997

Page 1 of 1

Mr. Speaker: We, the committee on Judiciary report that House Bill 222 (first reading copy -- white) do pass as amended.

Signed: Bob Clark
Bob Clark, Chair

And, that such amendments read:

1. Page 2, line 21.
Strike: "A"
Insert: "(1) Except as provided in subsection (2), a"
2. Page 2, line 24.
Strike: "(1)"
Insert: "(a)"
Renumber: subsequent subsections
3. Page 2, line 29.
Insert: "(2) A claim that alleges the existence of newly discovered evidence that, if proved and viewed in light of the evidence as a whole would establish that the petitioner did not engage in the criminal conduct for which the petitioner was convicted, may be raised in a petition filed within 1 year of the date on which the conviction becomes final or the date on which the petitioner discovers, or reasonably should have discovered, the existence of the evidence, whichever is later."

-END-

Committee Vote:
Yes 11, No 8.

321356SC.Hgd

SENATE JUDICIARY

Page 2

- BILL NO - REFERRED - HEARING - OTHER CONSIDERATION DATES - EXECUTIVE ACTION/DATE/VOTE - REREFERRED - DATE READ

HB0135	1/24	2/05	CONCUR AS AMENDED	VOTE: 10-0	2-6	2/08		
HB0137	SMITH, LIZ	1/30	3/07	NO INQUEST FOR PRISONER DEAD FROM DEATH SENTENCE OR TERMINAL CONDITION	CONCUR AS AMENDED	VOTE:10-0	3-7	3/12
HB0141	KEENAN, BOB	1/20	1/31	REVISE ADMINISTRATIVE PROVISIONS CONCERNING SUPREME COURT	CONCUR	VOTE:10-0	1-31	1/31
HB0159	BARNHART, BEVERLY	3/03	3/19	ALLOW DPHHS TO INITIATE CHILD CARE REMEDY IN JUSTICE, CITY, MUNI. OR DIST. COURT	CONCUR	VOTE:10-0	3-19	3/21
HB0163	JOHNSON, JOHN	3/28	4/07	REVISE ADOPTION LAWS	CONCUR AS AMENDED	VOTE: 10-0	4-8	4/09
HB0168	JOHNSON, ROYAL	1/30	3/07	GENERALLY REVISE CHILD SUPPORT ENFORCEMENT LAWS	CONCUR	VOTE:10-0	3-7	3/08
HB0195	TASH, BILL	2/19	3/04	REQUIRE STATE AGENCY PAY FEE TO FILE CERTAIN WARRANTS, LIENS, AND ABSTRACTS	CONCUR	VOTE:10-0	3-5	3/06
HB0200	AHNER, CHRIS	2/03	2/10	SURREPTITIOUS TAKING OF VISUAL IMAGE IN CERTAIN ROOMS IN PLACE OF BUSINESS	CONCUR	VOTE:10-0	2-12	2/14
HB0203	JOHNSON, ROYAL	3/03	3/19	REVISE CHILD ABUSE & NEGLECT LAWS	CONCUR AS AMENDED	VOTE:10-0	3-25	3/26
HB0215	ORR, SCOTT	2/05	2/20	EXPAND DEFINITION OF POLICE DOG TO INCLUDE SEARCH AND RESCUE	CONCUR	VOTE:10-0	2-20	2/20
HB0218	CLARK, ROBERT	1/23	1/31	REVISE REFERENCE TO FED. GUN-FREE SCHOOL ZONE ACT IN INDIVID. LICENSURE LAW	CONCUR	VOTE:10-0	1-31	1/31
HB0222	ANDERSON, SHIELL	2/19	3/05	DEATH PENALTY SENTENCING AND POSTCONVICTION PROCEEDINGS REVISIONS	CONCUR AS AMENDED	VOTE:9-1	3-7	3/12
	BARNHART, BEVERLY			REVISE CHILD CUSTODY & VISITATION; PARENTING PLAN REQUIRED				

1 HOUSE BILL NO. 222

2 INTRODUCED BY ANDERSON, M. TAYLOR, MERCER, DEVANEY, CRIPPEN, HARP

3
4 A BILL FOR AN ACT ENTITLED: "AN ACT ADOPTING STANDARDS ESTABLISHED FOR DEATH PENALTY
5 CASES BY THE FEDERAL ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996; IMPOSING
6 A TIME LIMIT FOR THE SENTENCING HEARING IN A DEATH PENALTY CASE; GENERALLY REVISING
7 LAWS PERTAINING TO POSTCONVICTION PROCEEDINGS; AMENDING SECTIONS 46-18-102, 46-18-301,
8 46-21-101, 46-21-102, 46-21-105, AND 46-21-201, MCA; AND PROVIDING EFFECTIVE DATES AND
9 APPLICABILITY DATES."

10
11 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

**THERE ARE NO CHANGES IN THIS BILL AND IT WILL NOT BE
REPRINTED. PLEASE REFER TO SECOND READING COPY
(YELLOW) FOR COMPLETE TEXT.**

HOUSE BILL NO. 222

INTRODUCED BY ANDERSON, M. TAYLOR, MERCER, DEVANEY, CRIPPEN, HARP

A BILL FOR AN ACT ENTITLED: "AN ACT ADOPTING STANDARDS ESTABLISHED FOR DEATH PENALTY CASES BY THE FEDERAL ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996; IMPOSING A TIME LIMIT FOR THE SENTENCING HEARING IN A DEATH PENALTY CASE; GENERALLY REVISING LAWS PERTAINING TO POSTCONVICTION PROCEEDINGS; AMENDING SECTIONS 46-18-102, 46-18-301, 46-21-101, 46-21-102, 46-21-105, AND 46-21-201, MCA; AND PROVIDING EFFECTIVE DATES AND APPLICABILITY DATES."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 46-18-102, MCA, is amended to read:

"46-18-102. Rendering judgment and pronouncing sentence. (1) The judgment ~~shall~~ must be rendered in open court.

(2) If the verdict or finding is not guilty, judgment ~~shall~~ must be rendered immediately and the defendant ~~shall~~ must be discharged from custody or from the obligation of ~~his~~ the bail bond.

(3) (a) ~~If~~ Except as provided in 46-18-301, if the verdict or finding is guilty, sentence ~~shall~~ must be pronounced and judgment rendered within a reasonable time.

(b) When the sentence is pronounced, the judge shall clearly state for the record ~~his~~ the reasons for imposing the sentence."

Section 2. Section 46-18-301, MCA, is amended to read:

"46-18-301. Hearing on imposition of death penalty. (1) When a defendant is found guilty of or pleads guilty to an offense for which the sentence of death may be imposed, the judge who presided at the trial or before whom the guilty plea was entered shall conduct a separate sentencing hearing to determine the existence or nonexistence of the circumstances set forth in 46-18-303 and 46-18-304 for the purpose of determining the sentence to be imposed. The hearing ~~shall~~ must be conducted before the court alone.

(2) (a) Subject to subsection (2)(b), the sentence must be pronounced and judgment rendered within 90 days after the defendant is found guilty or pleads guilty or within 90 days after the Montana

1 supreme court enters a final decision on appeal.

2 (b) The district court may allow not more than one extension of up to 60 days after entering
3 findings of fact that the extension is necessary to prevent undue hardship to a party."

4
5 **Section 3.** Section 46-21-101, MCA, is amended to read:

6 **"46-21-101. When validity of sentence may be challenged.** (1) A person adjudged guilty of an
7 offense in a court of record who has no adequate remedy of appeal and who claims that a sentence was
8 imposed in violation of the constitution or the laws of this state or the constitution of the United States,
9 that the court was without jurisdiction to impose the sentence, that a suspended or deferred sentence was
10 improperly revoked, or that the sentence was in excess of the maximum authorized by law or is otherwise
11 subject to collateral attack upon any ground of alleged error available under a writ of habeas corpus, writ
12 of coram nobis, or other common law or statutory remedy may petition the court that imposed the sentence
13 ~~or the supreme court~~ to vacate, set aside, or correct the sentence or revocation order.

14 (2) If the sentence was imposed by a justice's, municipal, or city court, the petition may not be
15 filed unless the petitioner has exhausted all appeal remedies provided by law. The petition must be filed
16 with the district court in the county where the lower court is located.

17 ~~(3) If the person is in custody, the person may elect to file the petition directly with the supreme~~
18 ~~court."~~

19
20 **Section 4.** Section 46-21-102, MCA, is amended to read:

21 **"46-21-102. When petition may be filed.** A (1) EXCEPT AS PROVIDED IN SUBSECTION (2), A
22 petition for the relief referred to in 46-21-101 may be filed at any time within ~~5 years~~ 1 year of the date
23 ~~of that~~ the conviction becomes final. A conviction becomes final for purposes of this chapter when:

24 ~~(1)(A)~~ the time for appeal to the Montana supreme court expires;

25 ~~(2)(B)~~ if an appeal is taken to the Montana supreme court, the time for petitioning the United States
26 supreme court for review expires; or

27 ~~(3)(C)~~ if review is sought in the United States supreme court, on the date that that court issues its
28 final order in the case.

29 (2) A CLAIM THAT ALLEGES THE EXISTENCE OF NEWLY DISCOVERED EVIDENCE THAT, IF
30 PROVED AND VIEWED IN LIGHT OF THE EVIDENCE AS A WHOLE WOULD ESTABLISH THAT THE

PETITIONER DID NOT ENGAGE IN THE CRIMINAL CONDUCT FOR WHICH THE PETITIONER WAS CONVICTED, MAY BE RAISED IN A PETITION FILED WITHIN 1 YEAR OF THE DATE ON WHICH THE CONVICTION BECOMES FINAL OR THE DATE ON WHICH THE PETITIONER DISCOVERS, OR REASONABLY SHOULD HAVE DISCOVERED, THE EXISTENCE OF THE EVIDENCE, WHICHEVER IS LATER."

Section 5. Section 46-21-105, MCA, is amended to read:

"46-21-105. Amendment of petition -- waiver of grounds for relief. (1) (a) All grounds for relief claimed by a petitioner under 46-21-101 must be raised in the original or amended original petition. The original petition may be amended only once. At the request of the state or on its own motion, the court shall set a deadline for the filing of ~~the~~ an amended original petition. If a hearing will be held, the deadline must be reasonably in advance of the hearing but may not be less than 30 days prior to the date of the hearing.

~~(b) These grounds for relief not raised in the original or amended petition are waived unless the court on hearing a subsequent petition finds~~ The court shall dismiss a second or subsequent petition by a person who has filed an original petition unless the second or subsequent petition raises grounds for relief that could not reasonably have been raised in the original or an amended original petition.

(2) When a petitioner has been afforded a direct appeal of the petitioner's conviction, grounds for relief that could reasonably have been raised on direct appeal may not be raised in the original or an amended original petition or in a second or subsequent petition. Ineffectiveness or incompetence of counsel in proceedings on an original or an amended original petition under this part may not be raised in a second or subsequent petition under this part."

Section 6. Section 46-21-201, MCA, is amended to read:

"46-21-201. Proceedings on petition. (1) (a) Unless the petition and the files and records of the case conclusively show that the petitioner is not entitled to relief, the court shall cause notice of the petition to be served upon the county attorney in the county in which the conviction took place and upon the attorney general and order them to file a responsive pleading to the petition. Following its review of the responsive pleading, the court may dismiss the petition as a matter of law for failure to state a claim for relief or it may ~~grant a prompt hearing on the petition, proceed to determine the issue, and make findings of fact and conclusions with respect to the petition.~~

1 **(b) If the death sentence has been imposed, upon receipt of the response or responses to the**
2 **petition, the court shall promptly hold a conference to determine a schedule for the expeditious resolution**
3 **of the proceeding. The court shall issue a decision within 90 days after the hearing on the petition or, if**
4 **there is no hearing, within 90 days after the filing of briefs as allowed by rule or by court order. If the**
5 **decision is not issued during that period, a party may petition the supreme court for a writ of mandate or**
6 **other appropriate writ or relief to compel the issuance of a decision.**

7 **(c) To the extent that they are applicable and are not inconsistent with this chapter, the rules of**
8 **procedure governing civil proceedings apply to the proceeding.**

9 **(2) If the death sentence has not been imposed and a hearing is required or if the interests of**
10 **justice require, the court shall appoint counsel for a petitioner who qualifies for the appointment of counsel**
11 **under Title 46, chapter 8, part 1.**

12 **(3) (a) Within 30 days after a conviction for which a death sentence was imposed becomes final,**
13 **the sentencing court shall notify the sentenced person that if the person is indigent and wishes to file a**
14 **petition under this chapter, the court will appoint counsel who meets the Montana supreme court's**
15 **standards for competency of appointed counsel in proceedings under this chapter for an indigent person**
16 **sentenced to death.**

17 **(b) Within 75 days after a conviction for which a death sentence was imposed upon a person who**
18 **wishes to file a petition under this chapter becomes final, the sentencing court shall:**

19 **(i) appoint counsel to represent the person if the court finds that the person is indigent and either**
20 **has accepted the offer of appointment or is unable to competently decide whether to accept the offer of**
21 **appointed counsel;**

22 **(ii) if the offer is rejected by a person who understands the legal consequences of the rejection,**
23 **enter findings of fact after a hearing, if the court determines that a hearing is necessary, stating that the**
24 **person rejected the offer with an understanding of the legal consequences of the rejection; or**

25 **(iii) if the court finds that the petitioner is not indigent, deny appointment of counsel.**

26 **(c) The court may not appoint counsel who has previously represented the person at any stage in**
27 **the case unless the person and the counsel expressly agree to the appointment.**

28 **(d) Violation of this subsection (3) is not a basis for a claim or relief under this chapter.**

29 **(3)(4) The court, for good cause, may grant leave to either party to use the discovery procedures**
30 **available in criminal or civil proceedings. Discovery procedures may be used only to the extent and in the**

1 manner that the court has ordered or to which the parties have agreed.

2 ~~(4)~~(5) The court may receive proof of affidavits, depositions, oral testimony, or other evidence. In
3 its discretion, the court may order the petitioner brought before the court for the hearing.

4 ~~(5)~~(6) If the court finds in favor of the petitioner, it shall enter an appropriate order with respect
5 to the judgment or sentence in the former proceedings and any supplementary orders as to reassignment,
6 retrial, custody, bail, or discharge as that may be necessary and proper. If the court finds for the
7 prosecution, the petition must be dismissed."

8
9 **NEW SECTION. Section 7. Attorney general petition to supreme court for competency standards.**

10 Within 60 days after [the effective date of this section], the attorney general shall, in compliance with 28
11 U.S.C. 2261, petition the supreme court for a court order establishing standards for competency of counsel
12 appointed to represent indigent persons in proceedings under Title 46, chapter 21, who are sentenced to
13 death. The court may hold appropriate proceedings on the petition, appoint a commission to advise it on
14 competency standards, and adopt standards.

15
16 **NEW SECTION. Section 8. Severability.** If a part of [this act] is invalid, all valid parts that are
17 severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its
18 applications, the part remains in effect in all valid applications that are severable from the invalid
19 applications.

20
21 **NEW SECTION. Section 9. Applicability.** (1) Except as provided in subsection (2), [sections 3
22 through 6] apply to proceedings in which the conviction becomes final:

23 (a) after [the effective date of this section]; or

24 (b) during the 12 months prior to the [effective date of this section] if a petition under Title 46,
25 chapter 21, is filed within the 12 months after [the effective date of this section].

26 (2) The provision in [section 6] that the notification must state that counsel to be appointed will
27 meet supreme court standards for counsel applies to petitions for postconviction relief filed after [the
28 effective date of standards adopted under section 7].

29
30 **NEW SECTION. Section 10. Effective dates.** (1) Except as provided in subsection (2), [this act]

1 is effective on passage and approval.

2 (2) The provision in [section 6] that the notification must state that counsel to be appointed will
3 meet supreme court standards for counsel is effective on [the effective date of standards adopted under
4 section 7].

5 -END-

MINUTES

MONTANA SENATE 55th LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By **CHAIRMAN BRUCE D. CRIPPEN**, on March 5, 1997,
at 9:05 A.M., in the Senate Judiciary Chambers (Room 325) of
the State Capitol, Helena, Montana.

ROLL CALL

Members Present:

Sen. Bruce D. Crippen, Chairman (R)
Sen. Lorents Grosfield, Vice Chairman (R)
Sen. Al Bishop (R)
Sen. Sue Bartlett (D)
Sen. Steve Doherty (D)
Sen. Sharon Estrada (R)
Sen. Mike Halligan (D)
Sen. Ric Holden (R)
Sen. Reiny Jabs (R)
Sen. Walter L. McNutt (R)

Members Excused: None

Members Absent: None

Staff Present: Valencia Lane, Legislative Services Division
Jody Bird, Committee Secretary

Please Note: These are summary minutes. Testimony and
discussion are paraphrased and condensed.

Committee Business Summary:

Hearing(s) & Date(s) Posted: HB 98, posted
HB 222, posted
HB 234, posted
Executive Action: HB 98, HB 195, HB 234

VICE CHAIRMAN LORENTS GROSFIELD ASSUMED THE CHAIR AT THIS POINT.

HEARING ON HB 98

Sponsor: REP. BOB CLARK, HB 8, Ryegate

Proponents: Mike Mahoney, Warden, Montana State Prison
Beth Baker, Department of Justice

Opponents: Scott Crichton, Executive Director, Montana ACLU
Sharon Hoff, Montana Catholic Conference

used, the death penalty is not a deterrent. If it's being enforced, these words mean something to criminals.

There are three things Montanans don't want: 1) a sales tax; 2) a speed limit; and 3) 21 years of inmate appeals.

HEARING ON HB 222

Sponsor: REP. SHIELL ANDERSON, HD 25, Livingston

Proponents: Attorney General Joe Mazurek
Beth Baker, Department of Justice
David Ohler, Counsel, Department of Corrections

Opponents: William F. Hooks, Appellate Defender, Department
of Administration
David Ness, Chair, Criminal Defense Section of the
Montana State Bar
Sharon Hoff, Montana Catholic Conference
Scott Crichton, Executive Director, Montana ACLU
Betty Waddell, Montana Association of Churches
Edmund F. Sheehy, Jr., ACLU
Tim Kuntz, Legislative Intern, Montana Trial
Lawyers Association (MTLA)

Opening Statement by Sponsor: REP. SHIELL ANDERSON, HD 25, Livingston. HB 222 implements the Anti-Terrorism and Death Penalty Act of 1996, in hope of bringing some finality to these cases following sufficient due process. I will reserve the right to close.

Proponents' Testimony: Attorney General Joe Mazurek. This is identical to HB 127, but doesn't contain the appropriation necessary to carry it out, so we are dealing with this in HB 2. After six years of effort by the National Association of Attorneys General, this was introduced by the Montana delegation and passed Congress, but was immediately challenged in court. We believe, however, that it will be upheld.

I believe Montana made case law with Duncan McKenzie. His case was seven times in the Supreme Court and there were appeals. His story was told in this body over a period of ten years in the Senate. Former Senator Ethel Harding's daughter, Lana, was the girl who was killed by Duncan McKenzie.

By opting into the federal legislation, Montana would have the advantage of a more expedited federal review, and assurance that attorneys would meet minimum competency standards, as well as that fees would be paid as necessary. Fees are already paid in Montana from the District Court Reimbursement Fund. The bill revises Montana's post-conviction process, as well.

If there is a re-sentencing order, the court must impose it within 90 days. The Court had waited one year in one case, and

that's too long. The bill requires the defendant to raise all the issues reasonably possible at the initial petition. In the Dawson case in Billings, a family was poisoned in a motel, but the Court decision was not made for 23 months afterward. We have state, circuit, and federal appeals processes to go through, so we need to expedite the processes and reduce delay.

Beth Baker, Department of Justice. The state must do three things to comply with the Federal Act (Section 6): 1) require appointment of counsel in the post-conviction process; 2) provide for reasonable costs, as federal courts look seriously at this; and 3) the state must provide for adoption of competency standards either by statute or rule. (EXHIBIT #5) is a necessary amendment to address a sentence, as a post-conviction case is a civil proceeding.

{Tape: 1; Side: B; Approx. Time Count: #27.6; Comments: 10:15 a.m.}

The second aspect of the bill is addressed on page 3 of our fact sheet (EXHIBIT #6), Reducing Delay in State Courts. There are parallel proceedings going on in state and federal courts. In the House it was argued that this is too restrictive. In other states where juries play a role in the death sentence, the sentencing hearing happens right away. That is done today in North Carolina, so it is not unusual or unconstitutional.

The law now says five years from the date of convictions, however, the bill changes this to one year from the date the conviction becomes final. In the Fiscal Note, between 1995-96 we had a 65 percent increase in the number of appeals, but our staff has not increased since 1989. So, we have asked for one attorney the first fiscal year and a second attorney, if necessary, the second fiscal year. Because of the increase in the criminal population, this is not unreasonable. I will be available for questions.

{Tape: 1; Side: B; Approx. Time Count: #34.8; Comments: 10:21 a.m.}

David Ohler, Counsel, Department of Corrections. The victims continually have difficulty with the appeals, and it is important for them to have finality. We also need to hold offenders accountable. Then we can hopefully reach them and rehabilitate them.

Opponents' Testimony: William F. Hooks, Appellate Defender, Department of Administration. I represent indigent defendants. The American Bar Association has recommended a moratorium on the death penalty (EXHIBIT #7).

Post-conviction comes after an unsuccessful appeal and provides a much broader opportunity to appeal an illegal or invalid sentence.

{Tape: 1; Side: B; Approx. Time Count: #38.7; Comments: None.}

Federal habeas reform has altered the balance dramatically concerning validity of a federal claim in state court. Now it is very limited. There are great restrictions to appealing a decision of the Ninth Circuit Court of Appeals. I believe extreme delays won't happen now with the federal habeas reform.

The opt-in provision to speed up executions would affect three or four inmates on death row in Montana now. I believe this bill runs counter to federal habeas reform.

The Feds can't grant relief where the state court denies, unless it is reasonably determined that the state court was wrong.

{Tape: 2; Side: A; Approx. Time Count: #00; Comments: 10:25 a.m.}

Concerning the 90-day period, there is no requirement for a prosecutor to give notice in Montana that they will seek the death sentence. So, it is important to give the accused and his attorneys sufficient time to prepare for a possible death sentence.

I believe this bill will create a burden to the district court. The one-year statute of limitations is better, but it is still defective, as they have no right to counsel in death penalty cases, but are most often indigent. SB 216 tightens the restriction on pleading these cases.

{Tape: 2; Side: A; Approx. Time Count: #5.3; Comments: None.}

There are validity of sentence issues such as misconduct of prosecutors, who failed to turn over evidence, or trial attorneys who drop the ball. This makes it hard to act within the one-year period. We have one year to file habeas, but it takes time to file state post-conviction, and that time is deducted from that one-year period. So a new attorney would have to come in and accumulate and review all prior information. It is important to note that death penalty inmates don't enjoy five years now.

In Section 5 there is no need to severely restrict this. Section 6 would allow the state court not to have to give a reason, and federal courts won't have anything to review. In a study by the U.S. Department of Justice of cases exonerated by DNA, it shows how important the opportunity for a full and fair hearing is in state courts. This bill just guts that.

Davis Ness, Chair, Criminal Defense Section of the Montana State Bar. I have been co-counsel in one death-sentence case. The American Bar identified three problems: 1) problems at the trial level; 2) post-convictions and habeas procedures; and 3) racial discrimination in the death penalty. Money should be defined at the outset as well as competent counsel.

American Bar Association standards generally required two counsel at the trial, and review levels. These problems are accentuated by this bill.

{Tape: 2; Side: A; Approx. Time Count: #13.9; Comments: 10:40 a.m.}

Especially in death penalty cases, the amount of delay in cases is directly in the Attorney General's Office. If the U.S. Supreme Court announces a new rule of law with a retroactive effect, the criminal can't get out of the one-year statute of limitations in making appeals.

It is important to look at the optive provision of the Federal Habeas Act which elevated state courts essentially to the level of federal courts, to have expedited process - if states had a fair forum, forms of payment, and competent counsel.

Parts of this bill would eviscerate the Federal Habeas Act, and the ability to obtain a fair hearing in court.

Sharon Hoff, Montana Catholic Conference reiterated her statements on the death penalty made during the hearing just prior to HB 222. The Catholic Church is compassionate toward victims as well as perpetrators, but there are ways to protect society without going to this extreme. Texas has one of the highest crime and execution rates in the U.S. I would encourage the Committee not to speed the process up, but to make certain justice is done, and that all involved are regarded and cared for.

{Tape: 2; Side: A; Approx. Time Count: #21.9; Comments: 10:47 a.m.}

Scott Crichton, Executive Director, Montana ACLU (EXHIBIT #8). Most defendants are indigent and have court-appointed counsel. U.S. law requires these people to be represented by attorneys with experience in capital cases. The Montana bill doesn't do this, as few attorneys have this experience. I am asking the Committee to see fit to pay for what they're passing, if you decide to pass this bill.

Betty Waddell, Montana Association of Churches. There is an average of 37 wrongful convictions every decade. All 3000 inmates on death row in the U.S. are indigent, but we also need to reassure victims and their families that justice is being served. I would encourage the Committee to oppose this bill.

Edmund F. Sheehy, Jr., ACLU. I am appearing as an attorney for nearly every death penalty case at the trial level. In dealing with the question of when sentence should be imposed, there is nothing in the Federal Act about a specific period of time such as 90 days, so this would create a problem.

In most cases, defendants will not tell their attorneys whether or not they're guilty. So, we can't be simultaneously getting ready for a sentencing hearing, as that defendant would ask for another lawyer or else ask why his attorney wasn't getting ready to represent him properly. The rules on mitigation in Subsection (2) allow almost everything in, and we must do this to avert problems down the road, but this is nearly impossible to do within 90 days. Evaluations for a client take time, and then we must make a decision on whether or not to disclose that information.

{Tape: 2; Side: A; Approx. Time Count: #30.8; Comments: 10:55 a.m.}

In one of my cases, the trial ended in July, but the judge made his decision three months later. I believe judges need this reasonable amount of time, as these are difficult decisions. We certainly don't need to increase the burden on them and on the attorneys who handle these cases. We can't plead the death penalty and competently represent a client at the same time. I am asking that you eliminate the 90-day period from the bill.

Tim Kuntz, Legislative Intern, Montana Trial Lawyers Association (MTLA). This bill makes it more likely to convict an innocent person, and it affects how fast we will put inmates to death.

Questions From Committee Members and Responses: VICE CHAIRMAN GROSFIELD. As a practical matter, I believe we are talking about 150 days. How much time is enough? **Edmund Sheehy.** What existing laws says "a reasonable time". Trial judges do a very good job of supervising these cases, and I don't believe we've had any case, except for the Lester Kills-On-Top case. **Attorney General Mazurek.** It is true that the Department of Justice is concerned about this case. I believe some cases handled by Mr. Sheehy have been within 90 days, and that this is not unreasonable.

VICE CHAIRMAN GROSFIELD. Would you comment on only allowing one 90-day period? **Attorney General Mazurek.** If a judge dies or is disqualified, then we could begin the time clock again.

SEN. BARTLETT. Why should the Legislature substitute its judgment for the judge who is hearing these arguments? **Attorney General Mazurek.** There is a public policy interest in bringing these matters to a conclusion within a reasonable period of time. These cases take too much time in the courts.

{Tape: 2; Side: A; Approx. Time Count: #41.2; Comments: None.}

SEN. BARTLETT. In the Federal Anti-Terrorism and Effective Death Penalty Act of 1996 is there a deadline for Montana to opt in? **Attorney General Mazurek.** Not to my knowledge, but there are certain benefits available if we do. I believe it is important

to do this now. Pam Collins can answer specific post-conviction questions.

{Tape: 2; Side: B; Approx. Time Count: #00; Comments: None.}

SEN. ESTRADA. Are there seven or eight on death row now? **Warden Mahoney.** There are seven.

SEN. ESTRADA. Is it correct that the majority are people of color? **Warden Mahoney.** That is not disproportionate in Montana.

SEN. ESTRADA. I want a list of nationalities and numbers on indigent inmates. **Warden Mahoney.** I will get this information. **Attorney General Mazurek** provided this information to the Committee (EXHIBIT #8).

SEN. STEVE DOHERTY. How do these bills (**SEN. VAN VALKENBURG's** and this one) mesh? **Beth Baker.** **SEN. VAN VALKENBURG's** bill came out of two recent Montana Supreme Court decisions, so we introduced this bill and then had him introduce the other bill later.

SEN. DOHERTY. What other provisions in the bill are not required by federal legislation? **Beth Baker.** Subsections (2) and (3) in Section 6 and Subsection (1) in Section 7 are not required. These deal with appointment of counsel, compensation, and competency standards.

SEN. BARTLETT. Page 4, line 28, concerns violation. If subsection (3) is not the basis for claim of relief, what remedy or recourse is there? **Beth Baker.** The language is in there for post-convictions claims, but if violated, other remedies are available, so it would not affect the ability to file a petition.

VICE CHAIRMAN GROSFIELD. These defenses could get fairly expensive, and if they use up initial monies, how would they claim indigence for future actions? **Beth Baker.** That has happened, and I believe the law would accommodate this.

VICE CHAIRMAN GROSFIELD. But the way the bill is structured, it doesn't look like that. **Beth Baker.** There is no constitutional right to an attorney in post-conviction proceedings, so the Court would have to review this.

SEN. MIKE HALLIGAN. Is 46-8-201 the State District Court Criminal Reimbursement Fund? **Beth Baker.** It states attorneys must be paid reasonable compensation via 3-5-901, MCA, the District Court Reimbursement Fund, and so counsel is compensated the same way as in criminal cases.

SEN. HALLIGAN. It is possible that we may need to coordinate this, if the way this is being done is changed. **Beth Baker.** It is my understanding that the District Court Reimbursement Fund is adequate right now to compensate.

SEN. DOHERTY asked for comment regarding whether three of the four cases mentioned on death row, were the result of what happened while they were in state custody.

SEN. CRIPPEN. How many are career capital cases? Edmund Sheehy. About a dozen.

SEN. CRIPPEN. In how many cases have you had to remain involved after you lost the case? Edmund Sheehy. Generally, after direct appeal, I haven't been involved.

SEN. CRIPPEN. If you weren't involved, why are you worried about the 90-day period? Edmund Sheehy. That 90-day period applies to trial via jury verdict.

SEN. CRIPPEN. How many cases resulted in convictions? Edmund Sheehy. Four cases are on death row. It hasn't come into play as it hasn't been issued at this point, but I believe it probably would increase.

{Tape: 2; Side: B; Approx. Time Count: #17.5; Comments: None.}

SEN. CRIPPEN. I like the bill, even though I am more of a "defense" man. What do you say to Mr. Sheehy's argument about the 90-day period? Beth Baker. Mr. Sheehy admitted it has only come up in one case that he's aware of, and what Mr. Hooks said is a smoke screen, as they are before an impaneled jury who must be apprised of the possible verdicts. So, I don't believe we will see more problems. I believe this bill codifies practice and is more reasonable.

Closing by Sponsor: REP. ANDERSON. We're talking about people who kill, and then aren't friend and neighbor types. They've been found guilty and also guilty of an aggravating offense. Two of three people think we should punish killers.

I don't believe any amount of delay would satisfy the opponents. This bill tries to give finality to the process. The National District Attorneys Association (all 50 states) criticized the American Bar Association's call for a moratorium, and said this is not the appropriate way to deal with this issue.

DNA testing and exculpatory evidence is addressed by a House amendment. This bill passed 87-12 in the House and its purpose is pretty clear - to be fair and expeditious. I hope the Committee will choose to pass it.

{Tape: 2; Side: B; Approx. Time Count: #27.3; Comments: 11:38 a.m.}

Amendments to House Bill No. 222
Third Reading Copy (Blue)

For the Committee on Judiciary

Prepared by Valencia Lane
March 5, 1997

1. Page 4.

Following: line 27

Insert: "(d) The expenses of counsel appointed pursuant to this
subsection (3) must be paid as provided in 46-8-201."

Renumber: subsequent subsection

DEPARTMENT OF JUSTICE HB 222: Reducing Delays in Criminal Cases

Background

State criminal convictions have, from the earliest days of Montana's statehood, been subject to different levels of post-trial review by the courts. Currently three levels of review exist:

- Criminal defendants who are convicted have a right to a **direct appeal** to the Montana Supreme Court under MCA Title 46, ch. 20.
- Defendants also have a right to a separate **post-conviction hearing** under MCA Title 46, ch. 21, once the right to direct appeal ceases to exist, if the offender has new claims that could not have been raised in direct appeal, such as ineffective assistance of counsel.
- Federal law grants the right to file a petition for **writ of habeas corpus** to allow a federal court to review any issues of federal law that have been decided in the course of the state direct appeal or state post-conviction hearing. Federal court review has traditionally been limited by several rules:
 - Only issues of federal law can be reviewed.
 - Only issues that have been litigated or "exhausted" in state court can be brought to federal court for review.
 - Only if the state court decision is based on federal law may a defendant seek review in the federal courts.
 - Defendants cannot raise claims in federal court unless they have followed procedures set by state law for bringing claims before the state courts.

Lengthy Delays

These multiple levels of review create the opportunity for significant delay in achieving finality in state criminal convictions, particularly in death penalty cases. In these cases, the defendant's objective is to prevent, or at least delay as long as possible, the execution of the sentence. For example, Duncan McKenzie's federal habeas corpus petition took almost three years to work its way through federal district court. McKenzie's first federal habeas corpus petition was filed in 1982, and he was ultimately executed in 1995, 13 years later.

New Federal Legislation

In April 1996, Congress passed and the President signed into law changes designed to reduce unnecessary delays in federal habeas corpus proceedings in death penalty cases. The changes require that the states take certain actions to ensure that their post-conviction review procedures provide defendants an adequate opportunity to secure a full and fair review of all claims. For states that take these actions, federal courts will be required to meet specific and much shorter time limits for making decisions in death penalty cases.

HB 222 takes advantage of these changes in federal law by "opting in" to the federal legislation for review of Montana's death penalty cases. Several steps need to be taken to "opt in":

- The State must guarantee the right to counsel in post-conviction cases involving the death penalty. HB 222 makes this right in death penalty cases explicit, and creates procedures for the orderly appointment of competent counsel.
- The State must establish minimum standards for the competency of attorneys who represent death penalty defendants in state post-conviction proceedings. HB 222 accomplishes this by requiring the Attorney General to petition the Montana Supreme Court for the adoption of such standards.
- The State must guarantee compensation for attorneys appointed to represent defendants in state post-conviction proceedings. Montana has already addressed this issue through the creation of the district court reimbursement fund. HB 222 incorporates existing procedures for payment of defense counsel.

Necessary Staff Resources

To realize the benefits of HB 222, the State must be able to comply with the relatively short time limits that will exist in both state and federal post-conviction proceedings. At current staffing levels, this will not be possible in Montana.

The caseload in the Appellate Legal Services Bureau in 1996 increased by 60 percent over that for 1995. The eight attorneys in that bureau now routinely have as many as 11 briefs and responses due in one month. Because of the heavy caseload, extensions of time deadlines are now routine. Such extensions will not be allowed in cases that are governed by the new deadlines.

Funding

HB 222 will require funding of \$234,000 for additional staff in the appellate section of the Attorney General's office to meet the growing caseload and ensure that the time limits that will apply to state death penalty cases can be met. These funds will allow one attorney and secretary to be hired in the first year of the biennium, and an additional attorney in the second year if the workload justifies additional legal staff.

Through changes like the "truth in sentencing" law strongly supported last session, Montanans have made it clear that they want the sentences imposed on criminals carried out. However, putting more people in prison and imposing longer sentences result in more legal challenges. This funding will assure that the Department of Justice has the legal staff necessary to see that criminal sentences are upheld.

DEPARTMENT OF JUSTICE

HB 222: Reducing Delay in State Courts

In an effort to avoid lengthy and costly delays in death penalty cases, HB 222 allows Montana to opt in to the federal legislation that established deadlines for federal court review of state cases. HB 222 also takes the following steps to eliminate opportunities for unnecessary delay in state post-conviction proceedings:

Current Law

- sets no time limit for imposing a death sentence. In one Montana death penalty case, the sentencing judge delayed resentencing after remand from the Montana Supreme Court for a full year.
- provides the defendant with the option to file a petition directly in the Montana Supreme Court. If factual issues are raised in a petition filed in the Supreme Court, remand is required for fact-finding proceedings in district court.
- allows a defendant to delay for five years after conviction before filing a post-conviction petition in state court.
- is not sufficiently clear in preventing litigation of issues in a second post-conviction petition that were or could have been litigated in the first petition.
- includes no time limits on a court's handling of post-conviction cases.

HB 222

- requires that a death sentence be imposed within 90 days after conviction or remand for resentencing. While this would allow reasonable preparation time, the bill would allow a single 60-day extension beyond the 90-day limit in extraordinary cases.
- creates a single method of proceeding, requiring that all post-conviction petitions be filed initially in the district court. This will eliminate delay in those cases where factual issues need to be determined, a category which includes many of the death penalty cases.
- reduces the time to one year, to run from the time proceedings on direct appeal are concluded or from the time new evidence is discovered.
- requires a court to dismiss a second petition that raises issues that either were or could have been raised in an earlier petition. The bill makes it clear that ineffectiveness of counsel in the post-conviction stage of a case is not grounds for relief from a criminal conviction.
- requires a court in a death penalty post-conviction case to issue a scheduling order and to issue a decision on the petition within 90 days after the hearing on the petition or the filing of written arguments if no hearing is held. If no decision is issued, a party to the case may petition the Supreme Court for a writ to compel a decision.

AMERICAN BAR ASSOCIATION
SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES
SECTION OF LITIGATION

SENATE JUDICIARY COMMITTEE
COMMIT NO. 73-5-97
DATE HB 222
HKS '88

RECOMMENDATION

RESOLVED, That the American Bar Association calls upon each jurisdiction that imposes capital punishment not to carry out the death penalty until the jurisdiction implements policies and procedures that are consistent with the following longstanding American Bar Association policies intended to (1) ensure that death penalty cases are administered fairly and impartially, in accordance with due process, and (2) minimize the risk that innocent persons may be executed:

- (i) Implementing ABA "Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases" (adopted Feb. 1989) and Association policies intended to encourage competency of counsel in capital cases (adopted Feb. 1979, Feb. 1988, Feb. 1990, Aug. 1996);
- (ii) Preserving, enhancing, and streamlining state and federal courts' authority and responsibility to exercise independent judgment on the merits of constitutional claims in state post-conviction and federal *habeas corpus* proceedings (adopted Aug. 1982, Feb. 1990);
- (iii) Striving to eliminate discrimination in capital sentencing on the basis of the race of either the victim or the defendant (adopted Aug. 1988, Aug. 1991); and
- (iv) Preventing execution of mentally retarded persons (adopted Feb. 1989) and persons who were under the age of 18 at the time of their offenses (adopted Aug. 1983).

FURTHER RESOLVED, That in adopting this recommendation, apart from existing Association policies relating to offenders who are mentally retarded or under the age of 18 at the time of the commission of the offenses, the Association takes no position on the death penalty.

No resolution presented herein represents the policy of the American Bar Association until it shall have been approved by the House of Delegates. Informational reports, comments and supporting data are not approved by the House in its voting and represent only the views of the Section or Committee submitting them.

REPORT

INTRODUCTION

The American Bar Association has adopted numerous policies bearing on the manner in which the death penalty should be applied in jurisdictions where it exists. These policies were adopted in view of the ABA's extensive experience with the administration of the death penalty and in light of several ABA-sponsored studies. The policies concern: (1) competent counsel in capital cases; (2) proper processes for adjudicating claims in capital cases (including the availability of federal *habeas corpus*); (3) racial discrimination in the administration of capital punishment; and (4) the execution of juveniles and mentally retarded persons.

The time has now come for the ABA to take additional decisive action with regard to capital punishment. Not only have the ABA's existing policies generally not been implemented, but also, and more critically, the federal and state governments have been moving in a direction contrary to these policies. The most recent and most dramatic moves, both strongly opposed by the ABA, have come in the form of laws enacted by Congress in 1996. Federal courts already are construing one law to significantly curtail the availability of federal *habeas corpus* to death row inmates, even when they have been convicted or sentenced to death as a result of serious, prejudicial constitutional violations. Another law completely withdraws federal funding from the Post-Conviction Defender Organizations that have handled many post-conviction cases and that have mentored many other lawyers who have represented death row inmates in such proceedings.

These two recently enacted laws, together with other federal and state actions taken since the ABA adopted its policies on capital punishment, have resulted in a situation in which fundamental due process is now systematically lacking in capital cases. Accordingly, in order to effectuate its existing policies, the ABA should now call upon jurisdictions with capital punishment not to carry out the death penalty until these policies are implemented. Of course, individual lawyers differ in their views on the death penalty in principle and on its constitutionality. However, it should now be apparent to all of us in the profession that the administration of the death penalty has become so seriously flawed that capital punishment should not be implemented without adherence to the various applicable ABA policies.

BACKGROUND

The backdrop for this Recommendation is the two decades of jurisprudence and legislation since the United States Supreme Court upheld new death penalty statutes in Gregg v. Georgia,¹ after having invalidated earlier death penalty statutes in 1972 in Furman v. Georgia.² In Furman, the Court believed that then-existing state statutes failed to properly balance the need to ensure overall consistency in capital sentencing with the need to ensure fairness in individual cases. Four

¹ 428 U.S. 153 (1976).

² 408 U.S. 238 (1972).

years later, in Gregg, the Court concluded that new state statutes' special procedural requirements for capital prosecutions provided a means by which the states would achieve that balance.

However, two decades after Gregg, it is apparent that the efforts to forge a fair capital punishment jurisprudence have failed.³ Today, administration of the death penalty, far from being fair and consistent, is instead a haphazard maze of unfair practices with no internal consistency. To a substantial extent, this situation has developed because death penalty jurisdictions generally have failed to implement the types of policies called for by existing ABA policies. The pervasive unfairness of the capital punishment system that has evolved since Gregg has led two of the Supreme Court Justices who were part of the majority in Gregg to regret having upheld the death penalty's constitutionality. Retired Justice Lewis Powell, in a 1991 interview, expressed his doubt whether the death penalty could be administered in a way that was truly fair and stated that, in retrospect, his greatest regret was that he had voted to uphold the constitutionality of capital punishment in McCleskey v. Kemp, 481 U.S. 279 (1987), and other cases.⁴ Justice Harry Blackmun expressed similar concerns in his 1994 dissent in McFarland v. Scott:

When we execute a capital defendant in this country, we rely on the belief that the individual was guilty, and was convicted and sentenced after a fair trial, to justify the imposition of state-sponsored killing. . . . My 24 years of overseeing the imposition of the death penalty from this court have left me in grave doubt whether this reliance is justified and whether the constitutional requirement of competent legal counsel for capital defendants is being fulfilled.⁵

The already deplorable state of affairs noted by Justices Powell and Blackmun is exacerbated by three other, very recent developments. First, although certain states have begun to implement some ABA policies, more states are moving in the opposite direction—undermining or eliminating important procedural safeguards that the ABA has found to be essential.

Second, Congress recently enacted legislation that makes it significantly more difficult for the federal courts to adjudicate meritorious federal constitutional claims in capital cases. Title I of the Anti-Terrorism and Effective Death Penalty Act of 1996 establishes deadlines for filing federal

³ See Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 Harv. L. Rev. 355, 357 (1995) (reporting that "[v]irtually no one thinks that the constitutional regulation of capital punishment has been a success"). See also James S. Liebman & Jonathan M. Moses, *Fatal Distortion: The Chronic Making and Unmaking of Death Penalty Law* (publication forthcoming).

⁴ See JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 451-52 (1994) (quoting Justice Powell).

⁵ 114 S. Ct. 2785, 2790 (1994).

habeas petitions, places limits on federal evidentiary hearings into the facts underlying federal constitutional claims, sets timetables for federal court action, limits the availability of appellate review, establishes even more demanding restrictions on second or successive applications for federal relief, and, in some instances, apparently bars the federal courts from awarding relief on the basis of federal constitutional violations where state courts have erred in concluding that no such violation occurred.

While the ABA has consistently supported meaningful *habeas corpus* reforms, this new federal legislation instead dramatically undermines the federal courts' capacity to adjudicate federal constitutional claims in a fair and efficient manner. Indeed, that may itself be unconstitutional, as the ABA already has asserted in an *amicus* brief. Congress' adoption of the 1996 Act only underscores the extent of this country's failure to fashion a workable and just system for administering capital punishment.

Third, and also contrary to longstanding ABA policies, Congress has ended funding for Post-Conviction Defender Organizations (PCDO's), which have handled many capital post-conviction cases and have recruited and supported volunteer lawyers in these cases for many indigent death row prisoners. The ABA had a major role in supporting the creation of the PCDO's.

Together, these three developments have brought the adjudication of capital cases to the point of crisis. Unless existing ABA policies are now implemented, many more prisoners will be executed under circumstances that are inconsistent with the Supreme Court's mandate, articulated in Furman and Gregg, that the death penalty be fairly and justly administered.

The ABA has worked hard to foster the fair and just administration of capital punishment. The ABA's Post-conviction Death Penalty Representation Project has provided expert advice and counsel to jurisdictions attempting to improve the delivery of legal services to death row prisoners. In addition, it has recruited more than 400 volunteer attorneys to represent indigent death row inmates. The Project also has assisted in the creation of PCDO's and strongly opposed the successful effort to cut off their federal funding. The ABA has testified in support of the Racial Justice Act and actively opposed the kind of *habeas corpus* restrictions enacted in 1996. And the ABA has conducted and supported a variety of training programs for lawyers and judges in capital cases and has advocated detailed standards for capital defense counsel. Also, various ABA groups have sponsored numerous education programs examining the fairness of capital punishment as implemented.

The ABA's efforts have had some impact. But recent developments have made the impact of incompetent counsel and the instances of uncorrected due process violations substantially greater, and matters are likely to become worse in the future. It is essential that the ABA now forcefully urge that executions not occur unless each person being executed has had competent counsel and the due process protections that the ABA has long advocated.

I. Competent Counsel

The ABA is especially well positioned to identify the professional legal services that should be available to capital defendants and death row inmates. The Association has shouldered that responsibility by conducting studies and adopting policies dating back nearly twenty years. Seven years ago, the ABA recommended that "competent and adequately compensated" counsel should be provided "at all stages of capital . . . litigation," including trial, direct review, collateral proceedings in both state and federal court, and *certiorari* proceedings in the U.S. Supreme Court.⁶ To implement that basic recommendation, the ABA said that death penalty jurisdictions should establish organizations to "recruit, select, train, monitor, support, and assist" attorneys representing capital clients.

Eight years ago, the ABA published the "Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases" and urged all jurisdictions that employ the death penalty to adopt them.⁷ Those guidelines call for the appointment of two experienced attorneys at each stage of a capital case.⁸ Appointments are to be made by a special appointing authority or committee, charged to identify and recruit lawyers with specified professional credentials, experience, and skills.⁹ The guidelines make it clear that ordinary professional qualifications are inadequate to measure what is needed from counsel in "the specialized practice of capital representation." To ensure that the lawyers assigned to capital cases are able to do the work required, the guidelines state that attorneys should receive a "reasonable rate of hourly compensation which... reflects the extraordinary responsibilities inherent in death penalty litigation." Concomitantly, counsel should be provided with the time and funding necessary for proper investigations, expert witnesses, and other support services.¹⁰

⁶ Resolution of the House of Delegates, Feb. 1990.

⁷ Resolution of the House of Delegates, Feb. 1989.

⁸ The ABA previously had urged the federal government to adopt similar procedures and standards for counsel appointed to represent death row prisoners in federal *habeas corpus* proceedings. Resolution of the House of Delegates, Feb. 1988. Before that, the ABA had urged the U.S. Supreme Court and the Congress to provide for competent counsel to handle *certiorari* proceedings and petitions for clemency before the Court. Resolution of the House of Delegates, Feb. 1979.

⁹ In addition, the guidelines set forth the way in which counsel in a capital case should perform various defense functions, from plea negotiations, through jury selection, the trial and sentencing phases, and post-conviction proceedings.

¹⁰ In August 1996, the ABA adopted a policy regarding the appropriate representation of military defendants facing execution. To date, the military has failed to implement this policy.

No state has fully embraced the system the ABA has prescribed for capital trials. To the contrary, grossly unqualified and under compensated lawyers who have nothing like the support necessary to mount an adequate defense are often appointed to represent capital clients. In case after case, decisions about who will die and who will live turn not on the nature of the offense the defendant is charged with committing, but rather on the nature of the legal representation the defendant receives.¹¹

Jurisdictions that employ the death penalty have proven unwilling to establish the kind of legal services system that is necessary to ensure that defendants charged with capital offenses receive the defense they require. Many death penalty states have no working public defender programs, relying instead upon scattershot methods for selecting and supporting defense counsel in capital cases.¹² For example, some states simply assign lawyers at random from a general list—a scheme destined to identify attorneys who lack the necessary qualifications and, worse still, regard their assignments as a burden. Other jurisdictions employ "contract" systems, which typically channel indigent defense business to attorneys who offer the lowest bids.¹³ Other states use public defender schemes that appear on the surface to be more promising, but prove in practice to be just as ineffective.¹⁴

¹¹ Marcia Coyle, et al., *Fatal Defense: Trial and Error in the Nation's Death Belt*, Nat'l L.J., June 11, 1990 (reporting the conclusions of an extensive six-state survey: capital trials are "more like a flip of the coin than a delicate balancing of the scales" because defense counsel are "ill trained, unprepared. . . [and] grossly underpaid").

¹² See Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime, But for the Worst Lawyer*, 103 Yale L.J. 1835 (1994).

¹³ Richard Klein, *The Emperor Gideon Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 Hastings Const. L.Q. 625, 679-680 (1986).

¹⁴ See Bright, *supra* note 12, at 1849-1852, summarizing the current situation as follows:

The structure of indigent defense not only varies among states, it varies within many states from county to county. Some localities employ a combination of programs. All of these approaches have several things in common. They evince the gross underfunding that pervades indigent defense. They are unable to attract and keep experienced and qualified attorneys because of lack of compensation and overwhelming workloads. Just when lawyers reach the point when they have handled enough cases to begin avoiding basic mistakes, they leave criminal practice and are replaced by other young, inexperienced lawyers who are even less able to deal with the overwhelming caseloads. Generally, no standards are employed for assignment of cases to counsel or for the performance of counsel. And virtually no resources are provided for investigative and expert assistance or defense counsel training.

It is scarcely surprising that the results of poor lawyering are often literally fatal for capital defendants. Systematic studies reveal the depth of the problems nationwide and thus supply the hard data to support reasoned policy-making.¹⁵ Case after case all too frequently reveals the inexperience of lawyers appointed to represent capital clients. In Tyler v. Kemp¹⁶ and Paradis v. Arave,¹⁷ state trial courts assigned capital cases to young lawyers who had passed the bar only a few months earlier; in Bell v. Watkins,¹⁸ a state trial court appointed a lawyer who had never finished a criminal trial of any kind; and in Leatherwood v. State,¹⁹ yet another trial court allowed a third-year law student to handle most of a capital trial.

Other cases demonstrate that defense counsel in capital cases often are incapable of handling such cases properly. In Smith v. State,²⁰ defense counsel asked for extra time between the guilt and sentencing phases of a capital case in order to read the state death penalty statute for

The situation has further deteriorated in the last few years. This is largely due to the increased complexity of cases and the increase in the number of cases resulting from expanded resources for police and prosecution and the lack of a similar increase, and perhaps even a decline, in funding for defense programs. *Id.* (citations omitted).

Moreover, at an ABA Annual Meeting program in 1995, Scharlette Holdman described case after case of incompetent representation by counsel appointed by judges in California and other Western states, in which compensation is typically greater than that in most other states with capital punishment. See Holdman in *Is There Any Habeas Left in this Corpus?*, 27 Loyola U. Chicago L.J. 524, 581 (1996). Thus, as the ABA has recognized, the problem is not merely underfunding. It is also the appointment by judges of attorneys who lack either the expertise or the experience necessary to represent a capital defendant effectively.

¹⁵ Over the years, both the ABA and local bar and legislative groups have commissioned such studies. In one instance, illustrative of other states' practices as well, researchers found that Texas typically does not use central appointing authorities to choose counsel in death penalty cases, does not monitor the performance of assigned counsel in capital cases, and does not adequately compensate appointed counsel or reimburse them sufficiently for support services. The Spangenberg Group, *A Study of Representation in Capital Cases in Texas* (1993).

¹⁶ 755 F.2d 741 (11th Cir.), *cert. denied*, 474 U.S. 1026 (1985).

¹⁷ 954 F.2d 1483 (9th Cir. 1992).

¹⁸ 692 F.2d 999 (5th Cir. 1982).

¹⁹ 548 So.2d 389 (Miss. 1989).

²⁰ 581 So.2d 497 (Ala. Crim. App. 1990).

the first time. In Frey v. Fulcomer,²¹ defense counsel, in purported compliance with a state statute, limited his presentation of mitigating evidence. Unbeknownst to defense counsel, that statute had been held unconstitutional three years earlier precisely because it restricted counsel's ability to develop mitigating evidence. In Ross v. Kemp,²² one defense attorney advanced a weak alibi theory, while his co-counsel mounted an inconsistent mental incompetency defense that necessarily conceded that the defendant had participated in the offense.²³ In Romero v. Lynaugh,²⁴ defense counsel declined to offer any evidence at all during the penalty phase of a capital case, and then made the following brief and ineffective closing argument: "You are an extremely intelligent jury. You've got that man's life in your hands. You can take it or not. That's all I have to say." The jury, in its turn, sentenced the defendant to death.

In Messer v. Kemp,²⁵ defense counsel presented very little of the mitigating evidence available, made no objections at all, then essentially told the jury that the death penalty was appropriate. That defendant, too, was sentenced to die. In Young v. Kemp,²⁶ the defense counsel was himself so dependent on drugs during trial that, as even he later admitted, he mounted only the semblance of a defense. His client received the death penalty, but then chanced to see the defense lawyer thereafter in a prison yard. The attorney had, in the interim, been convicted and sentenced on state and federal drug charges.

Even when experienced and competent counsel are available in capital cases, they often are unable to render adequate service for want of essential funding to pay the costs of investigations and expert witnesses.²⁷ In some rural counties in Texas, an appointed attorney receives no more than \$800 to represent a capital defendant.²⁸ Similar limits are in place in other

²¹ 974 F.2d 348 (3d Cir. 1992).

²² 393 S.E.2d 244 (Ga. 1990).

²³ See Bright, *supra* note 12 (listing these illustrative cases and dozens more).

²⁴ 884 F.2d 871 (5th Cir. 1989).

²⁵ 831 F.2d 946 (11th Cir. 1987).

²⁶ No. 85-98-2-MAC (M.D. Ga. 1985).

²⁷ Spangenberg Group, *supra* note 15, at 159; see also Anthony Paduano & Clive A.S. Smith, The Unconscionability of Sub-Minimum Wages Paid Appointed Counsel in Capital Cases, 43 Rutgers L. Rev. 281 (1991)(providing a national survey).

²⁸ Marianne Lavelle, Strong Law Thwarts Lone Star Counsel, Nat'l L.J., June 11, 1990, at 34. In one celebrated Texas case, the Fifth Circuit Court of Appeals noted that an appointed attorney had received only \$11.84 per hour in a capital case and, at that price, had rendered particularly dreadful service to his indigent client. That, said the court, explained much of the

states. In Virginia, the hourly rate for capital defense services works out to about \$13.²⁹ In an Alabama case, the lawyer appointed to represent a capital defendant in a widely publicized case was allowed a total of \$500 to finance his work, including any investigations and expert services needed. With that budget, it is hardly surprising that the attorney conducted no investigation at all.³⁰

Poorly prepared and supported trial lawyers typically do a poor job. When they do recognize points to be explored and argued, they often fail to follow through in a professional manner. And when they do not recognize what needs to be done, they do nothing at all or they take actions that are inimical to the needs of their clients. The result of such inadequacies in representation is that counsel often fail to present crucial facts. They also may fail to raise crucial legal issues, causing their clients to forfeit their opportunity to explore those issues later—in any court. In one recent case, appointed defense counsel scarcely did *anything* to represent his client at trial and, along the way, neglected to raise three significant constitutional claims. The federal court that reviewed the case could not consider any of these omitted claims because, under state law, counsel's numerous defaults barred their later consideration.³¹

The same pattern is repeated with respect to the legal services available for the appellate and post-conviction stages of capital cases. State appellate court standards for adequate representation under state law are extraordinarily low. These courts sometimes dispose of capital appeals on the basis of inadequate briefs containing only a few pages of argument—and, in so doing, often rely on defense counsel's "default" at trial to avoid considering constitutional claims on the merits.³² As for post-conviction, an ABA Task Force developed an enormous body of evidence in 1990 demonstrating that prisoners sentenced to death typically receive even less effective representation in post-conviction than at the trial stage.³³ The Supreme Court has held that there is no constitutional right to counsel in post-conviction proceedings, even in capital

problem. "[T]he justice system got only what it paid for." Martinez-Macias v. Collins, 979 F.2d 1067 (5th Cir. 1992).

²⁹ Richard Klein, *The Eleventh Commandment: Thou shalt Not Be Compelled To Render the Ineffective Assistance of Counsel*, 68 Ind. L.J. 363, 366 (1993).

³⁰ Deposition of Richard Bell, at 24-25, in Grayson v. State (Cir. Ct. Shelby County, Ala., Oct. 10, 1991). The state payment limit is now \$1,000.

³¹ Weeks v. Jones, 26 F.3d 1030 (11th Cir. 1994).

³² See Bright, *supra* note 12, at 1843 & n.55.

³³ American Bar Ass'n, *Toward a More Just and Effective System of Review in State Death Penalty Cases*, 40 Am. U. L. Rev. 1 (1990)[hereafter cited as Toward a More Just and Effective System].

cases.³⁴ Although many states and the federal government once funded Post-Conviction Defender Organizations, which recruited lawyers for death row inmates at the post-conviction stage and represented others themselves, today many of those centers have been forced to close because Congress has eliminated their federal funding.³⁵

The federal courts generally have not rectified this situation. The standard for effective assistance of counsel under the Sixth Amendment is so egregiously low that the potential for relief in federal *habeas corpus* on such grounds is almost always more theoretical than real. The federal courts found the "services" rendered in the Romero, Messer, and Young cases, cited above, to be "effective" for constitutional purposes—and, accordingly, all three prisoners were executed.

Compounding the effect of incompetent representation of capital defendants and death row inmates is improper representation of the state by prosecutors inadequately trained in avoiding constitutional violations. In describing this combined impact, former Pennsylvania Attorney General Ernest Preate said at an ABA Annual Meeting program, "[I]n too many capital cases, there is ineffective assistance of counsel on both sides [T]he defense counsel's ineffective assistance of counsel is not necessarily a mistake that the defense counsel originally made, but a mistake by the prosecutor. The prosecutor did something he or she shouldn't have done and the defense counsel failed to object or failed to take advantage of it"³⁶ Unfortunately, relief rarely is granted under any of the circumstances described above.

II. Proper Processes

The ABA consistently has sought to ensure that adequate procedures are in place to determine whether a capital sentence has been entered in violation of federal law. No other organization has monitored the federal *habeas* system more closely, developed greater expertise regarding that system's strengths and weaknesses, or offered more detailed prescriptions for reform.

³⁴ Murray v. Giarratano, 492 U.S. 1 (1989).

³⁵ See generally, *The Crisis in Capital Representation*, The Record, Association of the Bar of the City of New York Vol. 51 169, 187-191 (March 4, 1996)[hereafter cited as *Crisis*]. The PCDO's were extremely effective. In 1989, Chief Judge Tjoflat of the United States Court of Appeals for the Eleventh Circuit told the ABA Task Force that the Resource Centers were "indispensable." Toward a More Just and Effective System, *supra* note 33, at 73. In 1994, Judge Arthur L. Alarcon of the Court of Appeals for the Ninth Circuit wrote that the PCDO's were "critical" to the efficient processing of capital cases. Memorandum to Judges Cox and Cedarbaum, Dec. 7, 1994, cited in *Crisis*, *supra* at 188-189. Nevertheless, they were defunded.

³⁶ Ernest Preate, in *The Death of Fairness? Counsel Competency & Due Process in Death Penalty Cases*, 31 Houston L. Rev. 1105, 1120-21 (1994).

Fourteen years ago, the ABA publicly opposed three bills then pending in Congress that would have dramatically restricted the federal courts' ability to adjudicate state prisoners' *habeas* claims. At the same time, the ABA proposed alternatives that would have streamlined *habeas* litigation without undermining the federal courts' authority and responsibility to exercise independent judgment on the merits of constitutional claims.³⁷

Since that time, the ABA has been deeply involved in the national debate over federal *habeas*--particularly in capital cases. The ABA task force that studied the situation in depth created a solid scholarly foundation for its work, then received written and oral testimony from knowledgeable individuals and organizations at hearings in several cities.³⁸ In 1990, the ABA House of Delegates adopted a set of recommendations for improving current law that were based upon the Task Force's work.³⁹ The recommendations included the principles that a death row prisoner should be entitled to a stay of execution in order to complete one round of post-conviction litigation in state and federal court; that the federal courts should consider claims that were not properly raised in state court if the reason for the prisoner's default was counsel's ignorance or neglect; and that a prisoner should be permitted to file a second or successive federal petition if it raises a new claim that undermines confidence in his or her guilt or the appropriateness of the death sentence.

Regrettably, none of these recommendations has been generally adopted. In fact, the Supreme Court has denied death row prisoners the very opportunities for raising constitutional claims that the ABA has insisted are essential. Prisoners have not been entitled even to a single stay of execution to maintain the status quo long enough to complete post-conviction litigation.⁴⁰ The federal courts typically have refused to consider claims that were not properly raised in state court, even if the failure to raise them was due to the ignorance or neglect of defense counsel.⁴¹ And prisoners have often not been allowed to litigate more than one petition, even if they have offered strong evidence of egregious constitutional violations that they could not have presented earlier.⁴²

³⁷ Resolution of the House of Delegates, Feb. 1982.

³⁸ See Toward a More Just and Effective System, *supra* note 33.

³⁹ *Id.*; Resolution of the House of Delegates, Feb. 1990.

⁴⁰ See McFarland v. Scott, 114 S.Ct. 2568 (1994).

⁴¹ E.g., Coleman v. Thompson, 111 S.Ct. 2546 (1991).

⁴² E.g., McCleskey v. Zant, 499 U.S. 467 (1991). Moreover, the Supreme Court has developed numerous other door-closing doctrines that restrict death row prisoners' access to the federal courts for *habeas corpus* adjudication. See The Death of Fairness? Counsel Competency and Due Process in Death Penalty Cases, 31 Houston L. Rev. 1105 (1994).

The consequence of these legal tangles has been that meritorious constitutional claims often have gone without remedy. Contrary to popular belief, most *habeas* petitions in death penalty cases do not rest on frivolous technicalities. As Professor James S. Liebman has reported, in 40 percent of all capital cases, even in the face of all the procedural barriers, death row inmates still have been able to secure relief due to violations of their basic constitutional rights.⁴³ The percentage securing relief would be substantially higher if the federal courts had considered all death row inmates' claims on their merits.

Yet, in 1996, Congress enacted legislation that will make it even more difficult for the federal courts to adjudicate federal claims in capital cases. This new law, which the ABA vigorously opposed, establishes deadlines for filing federal *habeas* petitions, limits on federal evidentiary hearings into the facts underlying federal claims, timetables for federal court action, limits on the availability of appellate review, and even more demanding restrictions on second or successive applications from a single petitioner. The new law also contains a provision that, according to the *en banc* Seventh Circuit (and contrary to the ABA's position as *amicus curiae*), prevents a federal court from awarding relief on the basis of a claim that the federal court finds to be meritorious if it concludes that the state court that rejected the claim was not "unreasonably" wrong in doing so.⁴⁴

III. Race Discrimination

In 1988, the ABA adopted a policy of striving to eliminate "discrimination in capital sentencing on the basis of the race of either the victim or the defendant."⁴⁵ Nevertheless, longstanding patterns of racial discrimination remain in courts across the country.

Numerous studies have demonstrated that defendants are more likely to be sentenced to death if their victims were white rather than black.⁴⁶ Other studies have shown that in some

⁴³ Memorandum of James S. Liebman, Nov. 22, 1995.

⁴⁴ *Lindh v. Murphy*, 96 F. 2d 856, 870 (7th Cir. 1996). For a summary and analysis of the various new *habeas corpus* provisions, see Yackle, A Primer on the New Habeas Corpus Statute, 44 Buffalo Law Rev. 381 (1996).

⁴⁵ Resolution of the House of Delegates, Aug. 1988. In addition, the ABA has urged Congress to "prevent or minimize any disproportionate effects of general federal death penalty legislation on Native Americans subject to federal jurisdiction." Resolution of the House of Delegates, Aug. 1991.

⁴⁶ See Tabak, Is Racism Irrelevant? Or Should the Fairness in Death Sentencing Act Be Enacted to Substantially Diminish Racial Discrimination in Capital Sentencing?, 18 N.Y.U. Rev. L. & Soc. Change 777, 780-83 (1990-91) (summarizing various studies) (this law review article is an adaptation of the ABA's testimony in support of the proposed Racial Justice Act); U.S.

jurisdictions African Americans tend to receive the death penalty more often than do white defendants.⁴⁷ And in countless cases, the poor legal services that capital clients receive are rendered worse still by racist attitudes of defense counsel.⁴⁸

Justice Blackmun lamented the Court's failure to fashion an effective means of preventing the "biases and prejudices that infect society generally" from influencing "the determination of who is sentenced to death."⁴⁹ After years of watching race play so large a role in the administration of capital punishment, he concluded, in part for that reason, that he no longer could find any execution consistent with the Constitution. The ABA need not go so far in order to resolve, as a matter of ABA policy, that executions should cease until effective mechanisms are developed for eliminating the corrosive effects of racial prejudice in capital cases.

GENERAL ACCOUNTING OFFICE, DEATH PENALTY SENTENCING: RESEARCH INDICATES A PATTERN OF RACIAL DISPARITIES (Feb. 1990), *reprinted in* 136 CONG. REC. S6889-90 (daily ed., May 24, 1990); L. Ekstrand and H. Ganson, in panel discussion on Race and the Death Penalty, in *The Death Penalty in the Twenty-First Century*, 45 *Amer. U. L. Rev.* 239, 320-23, 341, 345, 347, 348 (1995). See also Samuel R. Gross & Robert Mauro, *Death and Discrimination: Racial Disparities in Capital Sentencing* (1989). In Kentucky, approximately 1,000 African Americans have been murdered over the past 20 years. Yet none of the prisoners on that state's death row is there for having killed a black victim. Letter from the Death Penalty Information Center, April 2, 1996.

⁴⁷ E.g., David C. Baldus, George Woodworth & Charles A. Pulaski, Jr., *Equal Justice and the Death Penalty: A Legal and Empirical Analysis* 399 (1990).

⁴⁸ Sadly, defense attorneys who shrink from rocking the boat locally still may fail, even in this day and age, to object to jury selection procedures that exclude African Americans from service. See Bright, *supra* note 12, at 1857, citing *Gates v. Zant*, 863 F.2d 1492, 1497-1500 (11th Cir.), *cert. denied*, 493 U.S. 945 (1989) (denying relief in such an instance). Cases in which defense attorneys use racial slurs in reference to their clients are also all too common. See Bright, *supra* note 12, at 1865, citing Transcript of Opening and Closing Arguments at 39, *State v. Dungee*, Record Excerpts at 102, (11th Cir.) (No. 85-8202), *decided sub nom. Isaacs v. Kemp*, 778 F.2d 1482 (11th Cir. 1985), *cert. denied*, 476 U.S. 1164 (1986), showing the following opening argument:

You have got a little ole nigger man over there that doesn't weigh over 135 pounds. He is poor and he is broke. He's got an appointed lawyer. . . . He is ignorant. I will venture to say he has an IQ of not over 80.

Unsurprisingly, the jury that heard that statement from defense counsel later sentenced the defendant to death.

⁴⁹ *Callins v. Collins*, 114 S.Ct. 1127, 1135 (1994) (dissenting opinion).

The Supreme Court, in rejecting a constitutional challenge to the systemic pattern of racial discrimination in capital sentencing, invited legislative action to deal with this situation.⁵⁰ Thereafter, the ABA, in conformance with a resolution adopted by the House of Delegates in August 1988, supported enactment of the Racial Justice Act, a measure designed to create a remedy for such racial discrimination.⁵¹ Although the House of Representatives twice has approved the Racial Justice Act, the full Congress has not enacted it. Accordingly, these patterns of racial discrimination remain unrectified. Ironically, Justice Powell, the author of the Supreme Court's 5-4 decision rejecting the constitutional challenge discussed above, has now indicated that he regrets his participation in that decision (as well as in other decisions upholding the death penalty) more than anything else during his tenure on the court.⁵²

IV. Execution of Mentally Retarded Individuals and Juveniles

The ABA has established policies against the execution of both persons with "mental retardation," as defined by the American Association of Mental Retardation,⁵³ and persons who were under the age of 18 at the time of their offenses.⁵⁴ Nevertheless, the Supreme Court has upheld the constitutionality of executions in both of those instances.⁵⁵ While many states now bar executions of the retarded, other states continue to execute both retarded individuals and, on occasion, offenders who were under 18 at the time they committed the offenses for which they were executed.⁵⁶

⁵⁰ See McCleskey v. Kemp, 481 U.S. 279, 319 (1987).

⁵¹ See Tabak, *supra* n. 46.

⁵² See JEFFRIES, *supra* n. 4, at 451-452.

⁵³ Resolution of the House of Delegates, Feb. 1989.

⁵⁴ Resolution of the House of Delegates, Aug. 1983.

⁵⁵ Penry v. Lynaugh, 492 U.S. 302 (1989)(refusing to hold that the execution of a mentally retarded prisoner violated the eighth amendment); Stanford v. Kentucky, 492 U.S. 361 (1989) (refusing to hold that the execution of prisoners who were 16 and 17 years of age at the time of their offenses violated the eighth amendment).

⁵⁶ Emily Reed, *The Penry Penalty: Capital Punishment and Offenders with Mental Retardation* 39 (1993)(reporting that mentally retarded prisoners account for 12% to 20% of the population on death row); Raymond Paternoster, *Capital Punishment in America* 95 (1991)(reporting that near the end of 1990 there were 32 death row prisoners who had been under 18 years of age at the time of their offenses); Victor Streib, Report (Sept. 19, 1995)(reporting 42 such prisoners only five years later). Since 1973, 140 death sentences have been imposed on juvenile offenders. Letter from the Death Penalty Information Center, April 2, 1996.

CONCLUSION

As former American Bar Association President John J. Curtin, Jr., told a congressional committee in 1991, "Whatever you think about the death penalty, a system that will take life must first give justice."³⁷ This recommendation would not commit the ABA to a policy regarding the morality or the advisability of capital punishment *per se*. Rather, this Recommendation would reinforce longstanding Association policies that seek to bring greater fairness to the administration of the death penalty. Those policies rest firmly on the special competence and experience that only members of the legal profession can bring to bear.

For many years, the ABA has conducted studies, held educational programs, and produced studies and law review articles³⁸ about the administration of the death penalty. As a result of that work, the Association has identified numerous, critical flaws in current practices. Those flaws have not been redressed; indeed, they have become more severe in recent years, and the new federal *habeas* law and the defunding of the PCDO's have compounded these problems. This situation requires the specific conclusion of the ABA that executions cease, unless and until greater fairness and due process prevail in death penalty implementation.

Respectfully submitted,

Leslie A. Harris
Chair, Section of Individual Rights and
Responsibilities

February 1997

³⁷ Hearings before the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary, U.S. House of Representatives, 102d Cong., 1st Sess. at 447 (1991).

³⁸ See, e.g., *Is There Any Habeas Left in This Corpus?*, 27 Loyola U. Chicago L. J. 524 (1996); *The Death of Fairness?*, see *supra* note 42; *Politics and the Death Penalty: Can Rational Discourse and Due Process Survive the Perceived Political Pressure?*, 21 Fordham Urban L. J. 239 (1994).

**MONTANA SENATE
1997 LEGISLATURE
JUDICIARY COMMITTEE**

ROLL CALL

DATE

3-5-97

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DATE 3-5-97

SENATE COMMITTEE ON Judiciary

BILLS BEING HEARD TODAY: HB 98, HB 222,
HB 234

< ■ > PLEASE PRINT < ■ >

Check One

Name	Representing	Bill No.	Support	Oppose
Beth Baker	Dept of Justice	222 ⁹⁸	✓	
Julie Mahoney	Dept of Corrections	98	✓	
BETH WADDELL	MT Assoc of Churches	222		✓
SHARON HOFF	MT ~~Catholic~~ Cong	222 98	Ango only	✓
Pam Collins	Depty Justice	98 222	✓	
William Hooks	Ref Appellate Office			✓
David Ness	Criminal Defense Section			✓
Tim Kutz	MTLA	222		✓

VISITOR REGISTER

PLEASE LEAVE PREPARED STATEMENT WITH COMMITTEE SECRETARY

MINUTES

MONTANA SENATE 55th LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By ACTING CHAIRMAN SEN. RIC HOLDEN, on March 7, 1997, at 9:10 a.m., in the Senate Judiciary Chambers (325) of the State Capitol, Helena, Montana.

ROLL CALL

Members Present:

Sen. Bruce D. Crippen, Chairman (R)
Sen. Lorents Grosfield, Vice Chairman (R)
Sen. Al Bishop (R)
Sen. Sue Bartlett (D)
Sen. Steve Doherty (D)
Sen. Sharon Estrada (R)
Sen. Mike Halligan (D)
Sen. Ric Holden (R)
Sen. Reiny Jabs (R)
Sen. Walter L. McNutt (R)

Members Excused: None

Members Absent: None

Staff Present: Valencia Lane, Legislative Services Division
Jody Bird, Committee Secretary

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed.

Committee Business Summary:

Hearing(s) & Date(s) Posted: HB 137, HB 168, HB 257
Executive Action: HB 137, HB 168, HB 222, HB
257, HB 68, HB 111

HEARING ON HB 257

Sponsor: REP. DEB KOTTEL, HD 45, Great Falls

Proponents: John Connor, Office of the Attorney General,
Department of Justice, and for Dennis
Paxinos, Yellowstone County Attorney
Shaun Donovan, Mineral County Attorney
Christopher Miller, Powell County Attorney

Bob Gilbert, Montana Magistrates
Mike McGrath, Lewis and Clark County Attorney, and
President, Montana County Attorneys
Bob McCarthy, Butte-Silver Bow County Attorney

Vote: SEN. BISHOP MOVED HB 137 BE CONCURRED IN AS AMENDED. THE MOTION CARRIED UNANIMOUSLY IN A ROLL CALL VOTE.

EXECUTIVE ACTION ON HB 168

Motion/Vote: SEN. WALTER MCNUTT MOVED HB 168 BE CONCURRED IN. THE MOTION CARRIED UNANIMOUSLY IN A ROLL CALL VOTE.

EXECUTIVE ACTION ON HB 222

Amendments: hb022202.avl (EXHIBIT #4)

Motion: SEN. ESTRADA MOVED HB 222 BE CONCURRED IN AS AMENDED.

Substitute Motion/Vote: VICE CHAIRMAN GROSFIELD MADE A SUBSTITUTE MOTION TO ADOPT ONLY #3 OF THE AMENDMENTS WHICH CLARIFY THAT IF A PERSON BECOMES INDIGENT LATER ON THEY CAN HAVE AN ATTORNEY APPOINTED. THE MOTION CARRIED UNANIMOUSLY.

Discussion: Valencia Lane. The Department of Justice has an amendment to insert a sentence for payment of counsel, as it was left out when the bill was drafted.

Motion: SEN. HALLIGAN MOVED THE AMENDMENT BE ADOPTED.

Discussion: SEN. HOLDEN. I am asking that the Department clarify 46-8-201, MCA. Beth Baker. It sets out compensation and payment by the county, as it is necessary for opting into the federal procedure. This makes it clear that we are using the same method in civil and criminal post-conviction proceedings, and it applies only to capital cases.

Vote: SEN. HALLIGAN'S MOTION TO ADOPT THE DEPARTMENT OF JUSTICE AMENDMENT CARRIED UNANIMOUSLY.

Discussion: SEN. CRIPPEN. Subsection (2) on page 1 line 30 makes a provision for 180 days. On page 2, line 3 the extension is reduced from 60 days to 30. Mr. Sheehy said 90 days is a rather short period of time in an extensive trial. Valencia Lane. There is another 90-day period, but I don't believe it's relevant at all. Beth Baker. The attorney must be prepared and cognizant of sentencing possibilities throughout the trial, and whatever limit the Legislature sets would become the standard. Our concern is with the precedent set in the Kills On Top case of one year ago.

Motion: SEN. CRIPPEN MOVED TO STRIKE "90" ON PAGE 1, LINE 30, FOLLOWING "WITH", AND TO INSERT "180", AND TO STRIKE "60" ON PAGE 2, LINE 3 AND INSERT "30".

VICE CHAIRMAN GROSFIELD. I am not enthralled by the proposed amendment, as it seems the extra amount of time is not necessary, because most often sentencing takes place immediately after

conviction. So, I believe it is important to keep this limit.
SEN. ESTRADA. I concur with **SEN. GROSFIELD**.

SEN. CRIPPEN. I appreciate your concern, but there may be other post-conviction proceedings in other states to guarantee extensions of time.

{Tape: 2; Side: A; Approx. Time Count: #27; Comments: 11:17 a.m..}

Any defense counsel worth their salt would look to provide the best possible defense during the trial period whether looking for the truth or proof, so 90 days is not enough time. Now we are looking at one year in the Kills-On-Top case. I'm saying let's give them six months or cut this period in half.

SEN. BISHOP. In the Gallahan case, he filed a post-conviction in December 1996, at about 90 days, and the state hadn't yet responded. So, maybe both sides are dragging their feet. **Beth Baker.** The state is usually given 30 days to respond. I can't tell you if the Department of Justice response has now been filed or not.

SEN. BISHOP. I believe 180 days would be appropriately sufficient, and I support **SEN. CRIPPEN's** amendment.

SEN. ESTRADA. I would support 120 days. **SEN. CRIPPEN.** I believe 90 days is too short, and one year is too long, so I would like to meet at the half-way point.

Vote: **SEN. CRIPPEN'S MOTION TO AMEND FAILED IN 4-6 IN A ROLL CALL VOTE WITH SENATORS BARTLETT, BISHOP, DOHERTY, AND CRIPPEN VOTING AYE AND ALL OTHERS VOTING NO.**

Motion/Vote: **SEN. CRIPPEN MOVED TO INSERT "120 DAYS" AND TO LEAVE THE 60-DAY PERIOD ALONE. THE MOTION CARRIED WITH ALL MEMBERS VOTING AYE EXCEPT SENATORS HOLDEN AND BARTLETT WHO VOTED NO.**

Motion/Vote: **SEN. ESTRADA MOVED HB 222 BE CONCURRED IN AS AMENDED. THE MOTION CARRIED UNANIMOUSLY.**

EXECUTIVE ACTION ON HB 257

Motion/Vote: **SEN. ESTRADA MOVED HB 257 BE CONCURRED IN. THE MOTION CARRIED WITH ALL MEMBERS VOTING AYE EXCEPT SEN. HALLIGAN WHO VOTED NO.**

EXECUTIVE ACTION ON HB 68

Amendments: Department of Corrections hb006801.av1 (EXHIBIT #5)

Motion: **SEN. ESTRADA MOVED TO ADOPT THE AMENDMENTS.**

Amendments to House Bill No. 222
Third Reading Copy (blue)

Requested by Senator Grosfield
For the Committee on Judiciary

Prepared by Valencia Lane
March 5, 1997

1. Page 2, line 2.

Strike: "The"

Insert: "Except as provided in subsection (2)(c), the"

2. Page 2.

Following: line 3

Insert: "(c) Additional extensions of time for imposition of sentence may be granted only in extraordinary circumstances, including but not limited to the death of the sentencing judge or one of the attorneys in the case."

3. Page 4.

Following: line 27

Insert: "(d) If a petitioner entitled to counsel under this subsection (3) was not indigent at the time the court's determination is made under subsection (3)(b) but thereafter becomes indigent at any stage of the proceedings, the court shall appoint counsel as provided in subsection (3)(b)(i)."

Renumber: subsequent subsection

MONTANA SENATE
1997 LEGISLATURE
JUDICIARY COMMITTEE
ROLL CALL VOTE

DATE 3-7-97 BILL NO. HB222 NUMBER 1

MOTION: Crip - 180 day amend

NAME	AYE	NO
SUE BARTLETT	✓	
AL BISHOP	✓	
STEVE DOHERTY	✓	
SHARON ESTRADA		✓
MIKE HALLIGAN		✓
RIC HOLDEN		✓
REINY JABS		✓
WALT MC NUTT		✓
LORENTS GROSFIELD, VICE CHAIRMAN		✓
BRUCE CRIPPEN, CHAIRMAN	✓	
	4	6

SEN:1995
wp:rlclvote.man
CS-11



SENATE STANDING COMMITTEE REPORT

Page 1 of 1
March 7, 1997

MR. PRESIDENT:

We, your committee on Judiciary having had under consideration House Bill 222 (third reading copy -- blue), respectfully report that House Bill 222 be amended as follows and as so amended be concurred in.

Signed: 

Senator Bruce Crippen, Chair

That such amendments read:

1. Page 1, line 30.

Following: "within" in two places

Strike: "90"

Insert: "120"

2. Page 4.

Following: line 27

Insert: "(d) If a petitioner entitled to counsel under this subsection (3) is not indigent at the time that the court's determination is made under subsection (3)(b) but thereafter becomes indigent at any stage of the proceedings, the court shall appoint counsel as provided in subsection (3)(b)(i).

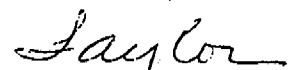
(e) The expenses of counsel appointed pursuant to this subsection (3) must be paid as provided in 46-8-201."

Renumber: subsequent subsection

-END-


SR

Amd. Coord.
Sec. of Senate


Senator Carrying Bill

501602SC.SRF

HOUSE BILL NO. 222

INTRODUCED BY ANDERSON, M. TAYLOR, MERCER, DEVANEY, CRIPPEN, HARP

A BILL FOR AN ACT ENTITLED: "AN ACT ADOPTING STANDARDS ESTABLISHED FOR DEATH PENALTY CASES BY THE FEDERAL ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996; IMPOSING A TIME LIMIT FOR THE SENTENCING HEARING IN A DEATH PENALTY CASE; GENERALLY REVISING LAWS PERTAINING TO POSTCONVICTION PROCEEDINGS; AMENDING SECTIONS 46-18-102, 46-18-301, 46-21-101, 46-21-102, 46-21-105, AND 46-21-201, MCA; AND PROVIDING EFFECTIVE DATES AND APPLICABILITY DATES."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 46-18-102, MCA, is amended to read:

"46-18-102. Rendering judgment and pronouncing sentence. (1) The judgment ~~shall~~ must be rendered in open court.

(2) If the verdict or finding is not guilty, judgment ~~shall~~ must be rendered immediately and the defendant ~~shall~~ must be discharged from custody or from the obligation of ~~his~~ the bail bond.

(3) (a) Except as provided in 46-18-301, if the verdict or finding is guilty, sentence ~~shall~~ must be pronounced and judgment rendered within a reasonable time.

(b) When the sentence is pronounced, the judge shall clearly state for the record ~~his~~ the reasons for imposing the sentence."

Section 2. Section 46-18-301, MCA, is amended to read:

"46-18-301. Hearing on imposition of death penalty. (1) When a defendant is found guilty of or pleads guilty to an offense for which the sentence of death may be imposed, the judge who presided at the trial or before whom the guilty plea was entered shall conduct a separate sentencing hearing to determine the existence or nonexistence of the circumstances set forth in 46-18-303 and 46-18-304 for the purpose of determining the sentence to be imposed. The hearing ~~shall~~ must be conducted before the court alone.

(2) (a) Subject to subsection (2)(b), the sentence must be pronounced and judgment rendered within 90 120 days after the defendant is found guilty or pleads guilty or within 90 120 days after the

1 Montana supreme court enters a final decision on appeal.

2 (b) The district court may allow not more than one extension of up to 60 days after entering
3 findings of fact that the extension is necessary to prevent undue hardship to a party."

4
5 **Section 3.** Section 46-21-101, MCA, is amended to read:

6 **"46-21-101. When validity of sentence may be challenged.** (1) A person adjudged guilty of an
7 offense in a court of record who has no adequate remedy of appeal and who claims that a sentence was
8 imposed in violation of the constitution or the laws of this state or the constitution of the United States,
9 that the court was without jurisdiction to impose the sentence, that a suspended or deferred sentence was
10 improperly revoked, or that the sentence was in excess of the maximum authorized by law or is otherwise
11 subject to collateral attack upon any ground of alleged error available under a writ of habeas corpus, writ
12 of coram nobis, or other common law or statutory remedy may petition the court that imposed the sentence
13 ~~or the supreme court~~ to vacate, set aside, or correct the sentence or revocation order.

14 (2) If the sentence was imposed by a justice's, municipal, or city court, the petition may not be
15 filed unless the petitioner has exhausted all appeal remedies provided by law. The petition must be filed
16 with the district court in the county where the lower court is located.

17 ~~(3) If the person is in custody, the person may elect to file the petition directly with the supreme~~
18 ~~court."~~

19
20 **Section 4.** Section 46-21-102, MCA, is amended to read:

21 **"46-21-102. When petition may be filed.** A (1) EXCEPT AS PROVIDED IN SUBSECTION (2), A
22 petition for the relief referred to in 46-21-101 may be filed at any time within ~~5 years~~ 1 year of the date
23 ~~of that~~ that the conviction becomes final. A conviction becomes final for purposes of this chapter when:

24 ~~(1)~~(A) the time for appeal to the Montana supreme court expires;

25 ~~(2)~~(B) if an appeal is taken to the Montana supreme court, the time for petitioning the United States
26 supreme court for review expires; or

27 ~~(3)~~(C) if review is sought in the United States supreme court, on the date that that court issues its
28 final order in the case.

29 (2) A CLAIM THAT ALLEGES THE EXISTENCE OF NEWLY DISCOVERED EVIDENCE THAT, IF
30 PROVED AND VIEWED IN LIGHT OF THE EVIDENCE AS A WHOLE WOULD ESTABLISH THAT THE

PETITIONER DID NOT ENGAGE IN THE CRIMINAL CONDUCT FOR WHICH THE PETITIONER WAS CONVICTED, MAY BE RAISED IN A PETITION FILED WITHIN 1 YEAR OF THE DATE ON WHICH THE CONVICTION BECOMES FINAL OR THE DATE ON WHICH THE PETITIONER DISCOVERS, OR REASONABLY SHOULD HAVE DISCOVERED, THE EXISTENCE OF THE EVIDENCE, WHICHEVER IS LATER."

Section 5. Section 46-21-105, MCA, is amended to read:

"46-21-105. Amendment of petition -- waiver of grounds for relief. (1) (a) All grounds for relief claimed by a petitioner under 46-21-101 must be raised in the original or amended original petition. The original petition may be amended only once. At the request of the state or on its own motion, the court shall set a deadline for the filing of ~~the~~ an amended original petition. If a hearing will be held, the deadline must be reasonably in advance of the hearing but may not be less than 30 days prior to the date of the hearing.

(b) ~~These grounds for relief not raised in the original or amended petition are waived unless the court on hearing a subsequent petition finds~~ The court shall dismiss a second or subsequent petition by a person who has filed an original petition unless the second or subsequent petition raises grounds for relief that could not reasonably have been raised in the original or an amended original petition.

(2) When a petitioner has been afforded a direct appeal of the petitioner's conviction, grounds for relief that could reasonably have been raised on direct appeal may not be raised in the original or an amended original petition or in a second or subsequent petition. Ineffectiveness or incompetence of counsel in proceedings on an original or an amended original petition under this part may not be raised in a second or subsequent petition under this part."

Section 6. Section 46-21-201, MCA, is amended to read:

"46-21-201. Proceedings on petition. (1) (a) Unless the petition and the files and records of the case conclusively show that the petitioner is not entitled to relief, the court shall cause notice of the petition to be served upon the county attorney in the county in which the conviction took place and upon the attorney general and order them to file a responsive pleading to the petition. Following its review of the responsive pleading, the court may dismiss the petition as a matter of law for failure to state a claim for relief or it may ~~grant a prompt hearing on the petition, proceed to determine the issue, and make findings of fact and conclusions with respect to the petition.~~

1 **(b) If the death sentence has been imposed, upon receipt of the response or responses to the**
2 **petition, the court shall promptly hold a conference to determine a schedule for the expeditious resolution**
3 **of the proceeding. The court shall issue a decision within 90 days after the hearing on the petition or, if**
4 **there is no hearing, within 90 days after the filing of briefs as allowed by rule or by court order. If the**
5 **decision is not issued during that period, a party may petition the supreme court for a writ of mandate or**
6 **other appropriate writ or relief to compel the issuance of a decision.**

7 **(c) To the extent that they are applicable and are not inconsistent with this chapter, the rules of**
8 **procedure governing civil proceedings apply to the proceeding.**

9 **(2) If the death sentence has not been imposed and a hearing is required or if the interests of**
10 **justice require, the court shall appoint counsel for a petitioner who qualifies for the appointment of counsel**
11 **under Title 46, chapter 8, part 1.**

12 **(3) (a) Within 30 days after a conviction for which a death sentence was imposed becomes final,**
13 **the sentencing court shall notify the sentenced person that if the person is indigent and wishes to file a**
14 **petition under this chapter, the court will appoint counsel who meets the Montana supreme court's**
15 **standards for competency of appointed counsel in proceedings under this chapter for an indigent person**
16 **sentenced to death.**

17 **(b) Within 75 days after a conviction for which a death sentence was imposed upon a person who**
18 **wishes to file a petition under this chapter becomes final, the sentencing court shall:**

19 **(i) appoint counsel to represent the person if the court finds that the person is indigent and either**
20 **has accepted the offer of appointment or is unable to competently decide whether to accept the offer of**
21 **appointed counsel;**

22 **(ii) if the offer is rejected by a person who understands the legal consequences of the rejection,**
23 **enter findings of fact after a hearing, if the court determines that a hearing is necessary, stating that the**
24 **person rejected the offer with an understanding of the legal consequences of the rejection; or**

25 **(iii) if the court finds that the petitioner is not indigent, deny appointment of counsel.**

26 **(c) The court may not appoint counsel who has previously represented the person at any stage in**
27 **the case unless the person and the counsel expressly agree to the appointment.**

28 **(D) IF A PETITIONER ENTITLED TO COUNSEL UNDER THIS SUBSECTION (3) IS NOT INDIGENT**
29 **AT THE TIME THAT THE COURT'S DETERMINATION IS MADE UNDER SUBSECTION (3)(B) BUT**
30 **THEREAFTER BECOMES INDIGENT AT ANY STAGE OF THE PROCEEDINGS, THE COURT SHALL APPOINT**

1 COUNSEL AS PROVIDED IN SUBSECTION (3)(B)(I).

2 (E) THE EXPENSES OF COUNSEL APPOINTED PURSUANT TO THIS SUBSECTION (3) MUST BE
3 PAID AS PROVIDED IN 46-8-201.

4 ~~(d)(F)~~ Violation of this subsection (3) is not a basis for a claim or relief under this chapter.

5 ~~(3)(4)~~ The court, for good cause, may grant leave to either party to use the discovery procedures
6 available in criminal or civil proceedings. Discovery procedures may be used only to the extent and in the
7 manner that the court has ordered or to which the parties have agreed.

8 ~~(4)(5)~~ The court may receive proof of affidavits, depositions, oral testimony, or other evidence. In
9 its discretion, the court may order the petitioner brought before the court for the hearing.

10 ~~(5)(6)~~ If the court finds in favor of the petitioner, it shall enter an appropriate order with respect
11 to the judgment or sentence in the former proceedings and any supplementary orders as to reassignment,
12 retrial, custody, bail, or discharge ~~as~~ that may be necessary and proper. If the court finds for the
13 prosecution, the petition must be dismissed."

15 NEW SECTION. Section 7. Attorney general petition to supreme court for competency standards.

16 Within 60 days after [the effective date of this section], the attorney general shall, in compliance with 28
17 U.S.C. 2261, petition the supreme court for a court order establishing standards for competency of counsel
18 appointed to represent indigent persons in proceedings under Title 46, chapter 21, who are sentenced to
19 death. The court may hold appropriate proceedings on the petition, appoint a commission to advise it on
20 competency standards, and adopt standards.

22 NEW SECTION. Section 8. Severability. If a part of [this act] is invalid, all valid parts that are
23 severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its
24 applications, the part remains in effect in all valid applications that are severable from the invalid
25 applications.

27 NEW SECTION. Section 9. Applicability. (1) Except as provided in subsection (2), [sections 3
28 through 6] apply to proceedings in which the conviction becomes final:

29 (a) after [the effective date of this section]; or

30 (b) during the 12 months prior to the [effective date of this section] if a petition under Title 46,

1 chapter 21, is filed within the 12 months after [the effective date of this section].

2 (2) The provision in [section 6] that the notification must state that counsel to be appointed will
3 meet supreme court standards for counsel applies to petitions for postconviction relief filed after [the
4 effective date of standards adopted under section 7].

5
6 **NEW SECTION. Section 10. Effective dates.** (1) Except as provided in subsection (2), [this act]
7 is effective on passage and approval.

8 (2) The provision in [section 6] that the notification must state that counsel to be appointed will
9 meet supreme court standards for counsel is effective on [the effective date of standards adopted under
10 section 7].

11 -END-